

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE
MANAGEMENT, et al.,

Petitioners,

and

KITSAP COUNTY ASSOCIATION OF
REALTORS,

Intervenor,

v.

CITY OF BAINBRIDGE ISLAND AND THE
WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Respondents.

CASE No. 14-3-0012

(PRSM)

FINAL DECISION AND ORDER

SYNOPSIS

Petitioners and Intervenor challenge the Shoreline Master Program (SMP) adopted by the City of Bainbridge Island under Ordinance No. 2014-04 and the Department of Ecology's approval of the City's SMP. The Board concludes Petitioners failed to demonstrate the action of the City and Ecology violated the provisions of the Shoreline Management Act, ch. 90.58 RCW, and Master Program Guidelines, WAC 173-26-171 through 251, that formed the basis for the petition for review. The appeal is denied and Case No. 14-3-0012 is dismissed.

PROCEDURAL BACKGROUND

By Ordinance No. 2014-04 the City of Bainbridge Island (City or Bainbridge) on July 14, 2014 adopted an updated Shoreline Master Program. The Department of Ecology (Ecology) issued its approval of the ordinance on July 16, 2014. Petitioners Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc. (collectively, "PRSM") are shoreline homeowners and homeowners' associations who participated in the City's and Ecology's public process for development and approval of the master program update. On October 7, 2014, PRSM filed a petition for review challenging adoption of the Shoreline Master Program (SMP) for failure to comply with various provisions of the Shoreline Management Act, chapter 90.58 RCW (SMA), the applicable guidelines, chapter 173-26 WAC, Part III (the Guidelines), and the Growth Management Act, chapter 36.70A. RCW (GMA). The petition for review set forth 52 legal issues and 39 sub-issues, which were consolidated by the Board under seven topic headings.¹

The Board granted in part PRSM's first motion to supplement the record² and denied a second motion.³ The Board granted intervention to Kitsap County Association of Realtors (Intervenor or Realtors) on the side of the petitioners.⁴

The briefs and exhibits of the parties were timely filed and are referenced in this order as follows:

- Petitioners' Prehearing Brief, January 16, 2015 (PRSM Brief).
- Prehearing Brief of Intervenor Kitsap County Association of Realtors, January 16, 2015 (Realtors' Brief).
- Respondent City of Bainbridge Island's Prehearing Brief, February 10, 2015 (City Brief).

¹ Prehearing Order, November 14, 2014.

² Order on Motion to Supplement the Record, January 5, 2015.

³ Second Order on Supplementation, February 10, 2015.

⁴ Order Granting Intervention and Revising Brief Limitations, January 5, 2015.

- Respondent State of Washington, Department of Ecology's Prehearing Brief, February 10, 2015 (Ecology Brief).
- Reply Brief of Intervenor Kitsap County Association of Realtors, February 20, 2015 (Realtors' Reply).
- Petitioners' Reply Brief, February 20, 2015 (PRSM Reply).

The Hearing on the Merits was convened February 24, 2015, in Bainbridge Island City Hall. Present for the Board were Margaret Pageler, presiding officer, Cheryl Pflug and William Roehl. Petitioners appeared by their attorney Richard Stephens.⁵ Intervenor appeared by its attorney Dennis Reynolds. Respondent City of Bainbridge Island was represented by City Attorney James Haney. Respondent Department of Ecology was represented by Assistant Attorney General Phyllis Barney. Valerie Allard provided court reporting services. A number of the individual petitioners were in attendance, as were several Bainbridge Island City Council members and members of the public.

The hearing afforded each party the opportunity to emphasize the most cogent facts and arguments relevant to its case.⁶ Board members asked questions seeking to thoroughly understand the history of the proceedings, the important facts in the case, and the legal arguments of the parties.

JURISDICTION

The Board finds the Petition for Review was timely filed within 60 days after publication as required by RCW 36.70A.290(2)(c).⁷ The Board finds the Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2)(b). The Board finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1)(a). However, the scope of the Board's review as established in RCW 90.58.190 restricts the Board's review of some of the issues alleged in the petition.

⁵ John Hemplemann was also in attendance with Richard Stevens for part of the hearing.

⁶ At the Hearing on the Merits Petitioners presented two illustrative exhibits: HOM Ex. 1, Enlargement of a portion of Shoreline Designation Map, SMP Appendix A, and HOM Ex. 2, Dock Prohibition Draft Layer, dated 7/11/2014.

⁷ Adoption and approval of the SMP was published on August 8, 2014, and the petition was filed October 7, 2014.

STANDARD AND SCOPE OF REVIEW, BURDEN OF PROOF

Comprehensive plans and development regulations, including shoreline master programs, are presumed valid on adoption. RCW 36.70A.320(1); *Lake Burien Neighborhood v. City of Burien*, GMHB Case No. 13-3-0012, Final Decision and Order (June 16, 2014), at 3. This presumption creates a high threshold for challengers, who have the burden to overcome the presumption of validity. *Id.* at 3-5.

The legislature provides that the Board must grant deference to cities in their planning for growth, so long as such planning is consistent with the requirements and goals of the GMA. RCW 36.70A.3201. This is because, while local planning takes place within a framework of state requirements, the local community has the responsibility to account for local circumstances. RCW 36.70A.3201. Deference is also due Ecology's interpretation of the SMA regulations (guidelines), which are adopted by Ecology to assist jurisdictions in the development of their master programs. RCW 90.58.060(1); *Elizabeth Mooney v. City of Kenmore*, GMHB Case No. 12-3-0004, Final Decision and Order (Feb. 27, 2013), at 5.

The Board's review of Ecology's decision to approve or reject an SMP is governed by RCW 36.70A.320(3) and RCW 90.58.190. The SMA prescribes different levels of Board review for SMP provisions concerning shorelines and those concerning shorelines of statewide significance (SSWS).

RCW 90.58.190(2)(b) provides:

If the appeal to the growth management hearings board concerns *shorelines*, the growth management hearings board shall review the proposed master program or amendment solely for compliance with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable guidelines, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58 RCW. (Emphasis added)

RCW 90.58.190(2)(c) provides:

If the appeal to the growth management hearings board concerns a *shoreline of statewide significance*, the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines

1 that the decision of the department is inconsistent with the policy of RCW
2 90.58.020 and the applicable guidelines. (Emphasis added)

3 Where the review concerns shorelines,⁸ the Board reviews a master program for
4 compliance with the SMA and its guidelines, the policy of RCW 90.58.020, the internal
5 consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105,
6 and SEPA compliance in master plan adoption. The Board shall find compliance unless it
7 determines that the action is *clearly erroneous* in view of the entire record before the board.
8 RCW 36.70A.320(3); *Mooney*, GMHB 12-3-004 at 4. To find an action clearly erroneous,
9 the Board must be left with the firm and definite conviction that a mistake has been
10 committed. *Id.* While deference is due the City under the clearly erroneous standard, it is
11 not unlimited, and the Board is required to provide a critical review of the City's actions.
12 *Swinomish Indian Tribal Cmty. v. Western Washington Growth Mgmt. Hearings Bd.*, 161
13 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007).

14
15 Where the Board's review concerns shorelines of statewide significance (SSWS),
16 the scope of the Board's review "is narrower and the evidentiary standard is enhanced,
17 consistent with the enhanced protection of the statewide interest over the local interest."
18 *Confederated Tribes and Bands of the Yakama Nation v. Yakima County*, GMHB Case No.
19 10-1-0011, Final Decision and Order (Apr. 4, 2011), at 4 n.8. The Board shall uphold
20 Ecology's decision regarding approval of a master program unless the board determines,
21 by *clear and convincing evidence*, that the decision is noncompliant with the policy of RCW
22 90.58.020, the applicable guidelines, or RCW 43.21C. RCW 90.58.190(c). Clear and
23 convincing evidence "requires that the trier of fact be convinced that the fact in issue is
24 'highly probable.'" *Colonial Imports, Inc. v. Carlton NW., Inc.*, 121 Wn.2d 726, 735, 853
25 P.2d 913 (1993) (internal citations omitted). This means that the facts relied upon must be
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30 ⁸ "'Shorelines' means all of the water areas of the state, including reservoirs, and their associated shorelands,
31 together with the lands underlying them; except (i) shorelines of statewide significance; (ii) shorelines on
32 segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less
and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty
acres in size and wetlands associated with such small lakes." RCW 90.58.030(2)(e). "Shorelands" in turn are
those lands extending landward for 200 feet in all directions as measured on a horizontal plane from ordinary
high water mark; floodways and contiguous floodplain areas and associated wetlands. RCW 90.58.030(2)(d).

1 clear, positive, and unequivocal in their implication. *Id.* Significantly, the Board's scope of
2 review for SSWS does not include GMA consistency considerations.

3 For Bainbridge Island, "shorelines" are the tidelands and the shorelands 200 feet
4 landward from the ordinary high water mark.⁹ The Board reviews SMP provisions for these
5 areas under the clearly erroneous standard.

6 Shorelines of statewide significance in Puget Sound are defined with specificity in
7 RCW 90.58.030(2)(f). For Bainbridge Island, the parts of the shoreline which are of
8 statewide significance are "all those areas lying waterward from the line of extreme low
9 tide." RCW 90.58.030 (1)(f)(iii).¹⁰ SMP at 67, § 4.1.1.2. Uses which are located in or
10 extend into marine waters below extreme low tide, such as docks, piers, buoys, floats,¹¹ and
11 floating homes, fall within the SSWS. Similarly, the City's designated Aquatic and Priority
12 Aquatic shoreline environments cross both shorelines and SSWS. Some of the uses and
13 shoreline modifications permitted in these environments may occur both within shorelines
14 and below extreme low tide in SSWS.¹² To the extent that Petitioners challenge provisions
15 relating to SSWS, the scope of the Board's review is narrowed and Petitioners must meet
16 the clear and convincing burden of proof.¹³

19 PRELIMINARY MATTERS

20 Order of Discussion.

21 The petition for relief in this case stated 52 legal issues and 39 sub-issues, each of
22 which was alleged as grounds for finding adoption and approval of the SMP was
23 inconsistent with the SMA and applicable guidelines. Both procedural and substantive
24
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26

27 ⁹ The SMP does not apply to any freshwater lakes or streams on Bainbridge Island. SMP at 17 § 1.3.5.1.

28 ¹⁰ SSWS for the City of Bainbridge excludes both the tidelands and the associated shorelands above the
29 ordinary high water mark. See RCW 90.58.030(2)(f)(vi) (omitting RCW 90.58.030(2)(f)(iii) from the inclusion of
30 tidelands and associated shorelands that are included with other defined marine SSWS).

31 ¹¹ As an example of where the SMP applies in SSWS, Ecology points out that recreational floats outside of
32 Eagle Harbor are required to be waterward as necessary "to obtain a depth of four feet (4') of water as
measured at extreme low tide at the landward end of the float, or the line of navigation, whichever is closer to
shore." SMP at 213 § 6.3.7.8.7.b. Ecology Brief, at 5.

¹² See SMP at 39, Table 4-1. Shoreline Use and Modification.

¹³ See *Hood Canal Sand & Gravel LLC v. Jefferson Cnty.*, WWGMHB Case No. 14-2-0008c, Order on
Dispositive Motion (Sept. 5, 2014), at 5.

1 violations are at issue. In the prehearing order the issues were re-grouped for briefing,
2 argument, and decision.

3 In general, the Board's discussion and analysis follows the order of the legal issues
4 as set forth in the prehearing order and argued in Petitioners' opening brief.¹⁴ Statements of
5 fact are set out at the beginning of most legal issues. However, Petitioners' underlying
6 objections may be discussed in several parts of the decision under various legal theories.
7

8 Abandoned Issues.
9

10 Two legal issues are dismissed as abandoned, having been argued by neither
11 Petitioners nor Intervenor.¹⁵ These are Issues I-3 and IV-1, concerning economic
12 assessment of the SMP.
13

14 Disregarded Arguments.
15

16 Several matters raised by Intervenor are outside the scope of the intervention
17 granted in the Board's January 5, 2015 order allowing intervention and also outside the
18 legal issues established in the prehearing order. These include:

- 19 • a challenge to the City's authority to promulgate a new SMP, Realtors' Brief at 4,
20 Realtors' Reply, at 4;
- 21 • a challenge to the City's Cumulative Impacts Analysis, Realtors' Brief at 10; and
- 22 • a challenge to Ecology's imposition and the City's adoption of a "no net loss"
23 standard; Realtors' Brief at 11, Realtors' Reply at 8-10.

24 RCW 36.70A.290(1) provides: "The board shall not issue advisory opinions on issues
25 not presented to the board in the statement of issues, as modified by any prehearing order."
26 Thus, new issues, not stated in the original petition for review, must be disregarded. *Hood*
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30 ¹⁴ Legal Issue I-2, concerning SMP Elements, is discussed under Legal Issue II, General Provisions, rather
31 than under Legal Issue I, Public Participation.

32 Legal Issue IV-5, concerning mooring buoys, is combined with Legal Issue IV-2, concerning piers, docks and
floats.

Legal Issue VI-4, hazard trees, is merged with Legal Issue VI-2, consistency between SMP provisions and
GMA development regulations.

¹⁵ WAC 242-03-590(1): Failure by a party to brief an issue shall constitute abandonment of the unbrieffed issue.

1 *Canal v. Kitsap County*, Case No. 06-3-0012c, Final Decision and Order (August 28, 2006),
2 p. 25.¹⁶

3 Intervention is not a vehicle for allowing admittance of a belated petition for review.
4 By not filing a timely petition for review, an Intervenor waives any right to argue new issues.
5 *1000 Friends of Washington v. City of Kent*, CPSGMHB Case. No. 04-3-0022, Order
6 Denying Motion to Reconsider (April 25, 2005), at 3; *see also Abenroth v. Skagit County*,
7 WWGMHB Case No. 97-2-0060, Order on Motions (October 16, 1997): "We will not allow
8 admittance of belated petitions filed as motions for intervention."
9

10 Intervenor's arguments on these matters must be disregarded by the Board.

11
12 General.

13 The Respondents divided their briefing and argument as requested by the Board,
14 deferring to each other with respect to briefing on the legal issues. The Board construes the
15 briefing by the City and Ecology each to have incorporated by reference the arguments of
16 the other.

17 The Board appreciates the professionalism of all the parties in this difficult and
18 emotion-laden process. Flexibility in scheduling, compliance with the Board's requirements
19 in document filing, and "abstaining from offensive personalities" are gratefully noted.
20

21
22 **LEGAL ISSUES**

23 **The Challenged Action**

24 On July 14, 2014, as the culmination of a four-year process, the City of Bainbridge
25 Island adopted Ordinance No. 2014-04, the update of its Shoreline Master Program
26 required by RCW 90.58.080. The City's action was promptly approved by Ecology and
27 became final.

28
29 Petitioners filed a timely petition for review by the Growth Management Hearings
30 Board, alleging numerous violations of the SMA and the applicable guidelines.
31
32

¹⁶ See also, *Samson v. City of Bainbridge Island*, Case No. 04-3-0013, p. 5, Order on Motions (July 6, 2004),
at 5; *Cotton v. Jefferson County*, Case No. 98-2-0017, Amended Final Decision and Order (April 5, 1999), p. 4.

- Under Legal Issue I, PRSM asserts deficiencies in the City's procedures, including improper notice, inadequate opportunity and response to citizen comments, and failure to assemble and utilize appropriate information.
- In Legal Issue II, PRSM finds fault with the City's application of general provisions of the SMA and guidelines concerning required elements, shorelines of statewide significance, critical areas, and shoreline environment designations.
- In Legal Issue III, PRSM and Intervenor argue that numerous SMP provisions negate the preference for single family residences and appurtenances granted in RCW 90.58.020 and the shoreline substantial development permit (SSDP) exemption in RCW 90.58.030(3)(e)(vi).
- In Legal Issue IV, PRSM and Intervenor object to SMP regulatory requirements for shoreline developments such as bulkheads, docks and piers, and floating homes notwithstanding exemption from the SSDP requirement under RCW 90.56.030(3)(e).
- Under Legal Issue V, PRSM contends the SMP is too complicated, internally contradictory and lacking in essential detail to ensure implementation of the SMA policies and the guidelines.
- Under Legal Issue VI, PRSM asserts provisions of the SMP are inconsistent with the City's comprehensive plan and development regulations.
- Under Legal Issue VII, PRSM challenges the SMP provisions for enforcement and penalties.

Legal Issue I – Public Participation and Process Failures

- I-1. Whether the City failed to comply with RCW 90.58.130 and guidelines referenced in the PFR, through faulty notice of public hearings, limiting comments at public hearings, failure or delay in providing information, submitting to DOE a version of the SMP differing from the version adopted by City Council, not responding to public comments, failing to follow its established public participation plan, and failing to give**

1 Ecology a record of oral comments made to the City. PFR 19, 20, 21, 22,
2 24, 25, 70.

3 **Statement of Facts – Public Participation**

4 The City's public participation process for the SMP began with the May 2010
5 adoption of the Bainbridge Island Shoreline Master Program Public Participation Plan. Ex.
6 E-250; SMP at 12, § 1.2.4. The public participation plan identified strategies to involve the
7 public in the development and adoption of the SMP, including shoreline education sessions,
8 the use of citizen committees, the posting of materials on the City's website, and public
9 hearings before the Planning Commission and City Council. Ex. E-250 at 15-17. The SMP
10 was finally enacted by the City on July 14, 2014 and approved by Ecology on July 16, 2014.

11 *First Year – Citizen Outreach and Staff Work – June 2010-August 2011.* Public
12 participation began with a series of five public education sessions in June and July 2010, at
13 which experts made presentations on SMP issues and during which there were open
14 discussions with the presenters. SMP at 13, § 1.2.4. The City formed three topic-based
15 citizen workgroups to assist in the drafting of the SMP.¹⁷ SMP at 1; SMP at 13-14, § 1.2.4.
16 Four community organizations with known interests in the SMP,¹⁸ one of which was
17 Petitioner Bainbridge Shoreline Homeowners, were given the opportunity to self-select
18 members to represent their organizations on the topic-based workgroups, and the remaining
19 three members of each workgroup were selected by members of the City Council and
20 Planning Commission. *Id.* Petitioners Alice Tawresy and Gary Tripp were among those
21 citizens who served on the workgroups. SMP at 1. The workgroups held approximately 45
22 meetings between September 2010 and August 2011, drafting and amending SMP
23 provisions. Workgroup recommendations were posted on the City's website for public
24 review and comment and forwarded to the Bainbridge Island Planning Commission. SMP at
25 14, § 1.2.4. The City used its existing Environmental Technical Advisory Committee (ETAC)

30 ¹⁷ Shoreline New and Existing Development Workgroup, Shoreline Setback and Vegetation Conservation
31 Work Group, and Shoreline Modification Work Group.

32 ¹⁸ Bainbridge Shoreline Property Owners, Bainbridge Concerned Citizens, Association for Bainbridge
Communities, and Bainbridge Island People for Puget Sound. At hearing, counsel for Petitioners stated
Bainbridge Shoreline Property Owners is the same organization as petitioner Bainbridge Shoreline
Homeowners.

1 to make scientific and technical recommendations. ETAC held at least 22 public meetings
2 on the SMP before forwarding its recommendations to the Planning Commission. See,
3 DOE's Index of Record, Exs. E-312 through E-327 and E-330 through E-335.

4 *Second Year – Planning Commission – July 2011 to April 2012.* Between July 2011
5 and March 2012, the Planning Commission held 17 study sessions reviewing and amending
6 the SMP, with opportunity for public comment at each session. SMP at 14, § 1.2.4. On
7 March 29, 2012, the Planning Commission held a public hearing on the draft SMP and, after
8 considering the testimony received, forwarded its recommended SMP to the City Council on
9 April 12, 2012. *Id.*

11 *Third Year – City Council – May 2012 to June 2013.* Between May 2012 and April
12 2013, the Bainbridge Island City Council conducted 11 SMP study sessions at which public
13 comment was taken. On May 8, 2013, the City Council held a public hearing on the SMP
14 and received extensive public testimony. *Id.* On May 15, 2013, the City Council passed
15 Resolution 2013-10 approving the amendments to the SMP and authorizing transmission of
16 the submittal SMP to Ecology for review. SMP at 14, § 1.2.4; Ex. 1925.

18 *Fourth Year – Ecology Review and City Final Adoption – July 2013 to July 2014.*
19 Once Ecology received the City's SMP submittal and verified it as complete on June 13,
20 2013, Ex. E-010, p. 18, Ecology began its own public participation process. Ecology held a
21 public comment period from July 22, 2013 to August 23, 2013 and conducted a public
22 hearing in Bainbridge on July 31, 2013. E-031, E-033. Over 200 people attended the
23 hearing and 112 provided oral or written comments. Ecology provided the City with the
24 summarized testimony and comments received on September 6, 2013, and, following the
25 requirements in WAC 173-26-120(6), the City provided responses to the comments to
26 Ecology on September 19, 2013. Ex. E-036.

28 On October 16 and October 25, 2013, Ecology issued its first set of required and
29 recommended changes to the City. Ex. 1951. A second set of Ecology changes was
30 provided November 15, 2013, Ex. 1964, and additional changes subsequently.¹⁹ The City
31
32

¹⁹ The later-requested/required changes primarily concern aquaculture which is not at issue in the present case.

1 held a public hearing November 20, 2013, Council workshops on March 24 and April 28,
2 2014 (Ex. 1988; Ex.1990), and a final public hearing on the entire SMP (with all changes
3 made since the May 15, 2013 approval) on July 14, 2014. At the close of the hearing, the
4 City Council adopted Ordinance 2014-04 finally adopting the SMP. It is this final adopted
5 document and Ecology's final approval that is now before the Board.
6

7 **Applicable Law**

8 **RCW 90.58.130** mandates that cities seek out and encourage public participation in
9 the SMP update process:
10

11 To insure that all persons and entities having an interest in the guidelines and
12 master programs developed under this chapter are provided with a *full*
13 *opportunity for involvement in both their development* and implementation, the
14 department and local governments shall:

15 (1) *Make reasonable efforts to inform the people* of the state about the
16 shoreline management program of this chapter and in the performance of the
17 responsibilities provided in this chapter, *shall not only invite but actively*
18 *encourage participation* by all persons and private groups and entities *showing*
19 *an interest in shoreline management* programs of this chapter.(emphasis
20 added)

21 **WAC 173-26-090²⁰** provides:

22 In developing master programs and amendments thereto, the department and
23 local governments, pursuant to RCW 90.58.130 shall make *all reasonable*
24 *efforts to inform, fully involve and encourage participation of all interested*
25 *persons* and private entities, and agencies of the federal, state or local
26 government having interests and responsibilities relating to shorelines of the
27 state and the local master program.

28 ... Such procedures shall provide for early and continuous public participation
29 through broad dissemination of informative materials, proposals and
30 alternatives, opportunity for written comments, public meetings after effective
31 notice, provision for open discussion, and consideration of and response to
32 public comments. (emphasis added).

²⁰WAC 173-26-090 is incorporated in the Guidelines through WAC173-26-201(1)(a) **Participation requirements.**

1 The Guidelines, at WAC 173-26-201(3)(b)(i), require local governments planning
2 under GMA to also comply with the public participation requirements of **RCW 36.70A.140**,
3 which provides:

4 Each county and city that is required or chooses to plan under RCW
5 36.70A.040 shall establish and broadly disseminate to the public a public
6 participation program identifying procedures providing for early and
7 continuous public participation in the development and amendment of
8 comprehensive land use plans and development regulations implementing
9 such plans. The procedures shall provide for broad dissemination of
10 proposals and alternatives, opportunity for written comments, public
11 meetings after effective notice, provision for open discussion, communication
12 programs, information services, and consideration of and response to public
13 comments. . . . Errors in exact compliance with the established program and
14 procedures shall not render the comprehensive land use plan or
development regulations invalid if the spirit of the program and procedures is
observed.

15 WAC 173-26-100 states that, for local governments planning under the GMA, "local
16 citizen involvement strategies should be implemented that ensure early and continuous
17 public participation consistent with WAC 365-195-600," the advisory Department of
18 Commerce guidelines for GMA planning.

20 Discussion and Analysis

21 As summarized in the chronology of adoption above, Bainbridge Island adopted a
22 Public Participation Plan at the outset of its SMP update process. Ex. E-250. PRSM
23 contends the ensuing process failed to fully comply with the adopted plan and violated the
24 SMA's broad public participation requirements in multiple ways. The specific objections
25 raised by PRSM include "failing to provide timely public notice of hearings; changing the
26 draft available to the public at the time of the notice of the hearing; not making documents
27 available prior to the public hearing; limiting comments at public hearing; and, failing to
28 respond to public comments in any meaningful manner and submitting to DOE a version of
29 the SMP that differed from the version adopted by the City Council at a public hearing."
30 PRSM Brief at 6.
31
32

1 The City asserts its citizen outreach was robust and responsive. Specific allegations
2 of non-compliance are rebutted. Ecology defers to the City's brief on public participation
3 issues. Ecology Brief, at 13.

4 The Board addresses first the question of adequacy of provision for and response to
5 public comment; then the questions around notice of hearings and additions or amendments
6 to the drafts under consideration. The guidelines specify: "for local governments planning
7 under the Growth Management Act, the [public participation] provisions of RCW 36.70A.140
8 also apply." The Board therefore looks to its substantial record of decisions under that
9 statute. Both the SMA and GMA provisions require procedures for "dissemination of
10 informative materials, proposals and alternatives, opportunity for written comments, public
11 meetings after effective notice, provision for open discussion, and consideration of and
12 response to public comments." Petitioners contend the City gave these procedures short
13 shrift.
14

15
16 Provision for Open Discussion.
17

18 The City at the outset adopted a public participation plan intended to allow "early and
19 continuous public participation." Ex. E-250. Failure to comply with its own local adopted
20 process may be the basis for a finding of non-compliance,²¹ but the Board has recognized that
21 "[t]he public participation process mandated by the GMA will often result in mid-stream
22 changes" and has allowed reasonable flexibility, especially where the process changes are
23 responsive to events or requests that arise during the review period. *North Everett*
24 *Neighborhood Association v. City of Everett*, CPSGMHB Case No. 08-3-0005, Final Decision
25 and Order (April 28, 2009), p. 18.²²
26

27 The City's participation plan made "provision for open discussion," particularly during
28 the first year when citizens attended open forums and then served on workgroups developing
29

30
31 ²¹ See general, *McVittie V v. Snohomish County*, CPSGMHB Case No. 00-3-0015, Final Decision and Order
32 (April 12, 2001), at 16-25; *McNaughton v. Snohomish County*, CPSGMHB Case No. 06-3-0027, Final Decision
and Order (January 29, 2007) at 21-22.

²² Citing *Cave v. City of Renton*, CPSGMHB No. 07-3-0012, Final Decision and Order (July 30, 2007), at 13;
Halmo v. Pierce County, CPSGMHB Case No. 07-3-0004c, Final Decision and Order (September 28, 2007), at
26.

1 the first draft of the SMP. Petitioner Bainbridge Shoreline Homeowners Association had a
2 designated seat on each of the three workgroups, and petitioners Alice Tawresy and Gary
3 Tripp were members of the SMP Task Force that coordinated the workgroup process. SMP, p.
4 1. **The Board finds** PRSM has not demonstrated the City failed to make provision for open
5 discussion.
6

7 Opportunity for Written Comment.
8

9 The City's plan provided "opportunity for written comment," and petitioners similarly
10 availed themselves of this opportunity. The City Council and Planning Commission comment
11 matrices identify over 2000 written comments, at least 363 of which are attributed to named
12 petitioners or their attorney.²³ PRSM complains the City failed to keep proper track of
13 comments and questions, noting the Board's order on supplementation admitted 21
14 documents that did not show up on the City's index.²⁴ Viewed in context, the error is *de*
15 *minimis*. Importantly, written comments were not limited in length. Petitioner Young's primary
16 submittal was 98 single-spaced pages of legal argument,²⁵ putting into perspective the City's
17 time limitations for oral comments. **The Board finds** the City provided ample opportunity for
18 written comment.
19

20 Public Hearing and Oral Comments.
21

22 Ecology's guidelines require a city to "[c]onduct at least one public hearing" to consider
23 a draft SMP.²⁶ Bainbridge provided a public hearing before the Planning Commission and
24 three City Council public hearings. Petitioners fault the City for restricting oral comments at its
25 public hearings to two minutes per person and for limiting the topics for comments at some
26 hearings.
27

28 The Board notes both WAC 173-26-090 and the GMA public participation provisions
29 at RCW 36.70A.140 require "opportunity for *written* comments." The City in this case
30

31 ²³ Ex. 1939. A. Tawresy – 57; Bainbridge Shoreline Homeowners – 47; G. Tripp -121; D. Haugan – 5; L.
32 Young – 26; D. Flora – 23; J. Rosling – 4; Bainbridge Defense Fund – 24; D. Reynolds (then attorney for
Bainbridge Shoreline Homeowners) – 38.

²⁴ PRSM Brief, p. 9, n. 4.

²⁵ In Ecology's Index as E-033, Public Comment no. 4b; in City's Index as nos. 1824, 1835, 1836.

²⁶ WAC 173-26-100(1).

1 accepted written comments from interested citizens throughout its SMP update process.²⁷
2 In addition, public hearings were by no means the only opportunity for oral comment. Each
3 of the Planning Commission and City Council study sessions, 28 in all before submittal to
4 Ecology, included time for citizen comment, and various petitioners availed themselves of
5 these opportunities.

6 The Board sympathizes equally with the frustrated expectations of citizens at public
7 hearings where oral testimony is limited and with the difficulty facing council members who
8 want to absorb a broad range of public input without unduly extending the process.
9 Evenings are simply not long enough for a part-time city council to hear all that every
10 interested citizen may wish to say. In this context, as the Board ruled in one of its earliest
11 decisions,²⁸ limiting the length of oral testimony and limiting the subject of oral testimony
12 allowed at public hearings is fair and reasonable, so long as written testimony is accepted
13 throughout the process.²⁹

14
15
16 **The Board finds** PRSM has not carried its burden of demonstrating a violation of
17 any GMA or SMA requirement in the City's limitations on oral comments in its public
18 process.

19
20 *Consideration and Response to Public Comments.*

21 The City provided "consideration of and response to public comments" as required by
22 WAC 173-26-090 and RCW 36.70A.140 in a 340-page matrix of over 2000 comments
23 submitted to Ecology. However PRSM views the City's responses as inadequate. PRSM
24 points to the City's public participation plan which states:

25
26 In addition, the many written comments and questions that are submitted to the
27 City throughout the process will be formally documented. Responses to

28
29 ²⁷ Counsel for Bainbridge at the hearing on the merits.

30 ²⁸ *Twin Falls v. Snohomish County*, CPSGMHB Case No. 93-3-0003, Final Decision and Order (September 7,
31 1993), at 75 ("in view of the volume of people who wish to express an opinion and the limitations of the hearing
32 format"); see also *Bremerton/Alpine v. Kitsap County*, CPSGMHB 95-3-0039c/98-3-0032c, Final Decision and
Order (February 8, 1999), at 26.

²⁹ See, *Halmo v. Pierce County*, CPSGMHB Case No. 07-3-0004c, Final Decision and Order (September 28,
2007), at 26: (no violation of GMA where "Pierce County's proceedings were open, petitioners participated
actively at all stages of the process, and *comment was accepted up until the final vote* of the County Council."
(emphasis added)).

1 comments and questions will be made available as promptly as possible on a
2 specific schedule and stored in readily accessible formats, such as question
3 and answer summaries, meeting summaries and transcripts and frequently
4 asked questions pages. These will be available on the City's web site and hard
5 copies available at City Hall. As a result, stakeholders will be able to track their
6 comment/question(s) and know how they were addressed during the process.

7 Ex. E-250, p 11.

8 PRSM cites RCW 90.58.130 and WAC 173-26-090, then argues by analogy from
9 agency rule-making requirements under the APA; RCW 34.05.325 and *Mahoney v.*
10 *Shinpoch*, 107 Wn.2d 679 (1987). In particular, PRSM objects to a mere notation of
11 "comment noted" as the City Council tersely provided on 146 occasions and the Planning
12 Commission responded 349 times. Ex. 1939. Additionally, PRSM states the City gave *no*
13 substantive response to comments about science. (PRSM Brief, p. 21).

14 WAC 173-26-090 calls for "consideration of and response to public comments." The
15 Board declines to construe this to impose upon the City the obligation to provide a
16 personalized response to each and every comment. The Board has long recognized that the
17 parallel requirement under GMA to respond to citizen comments does not obligate the City
18 to agree with the comment or to provide a personalized answer to each comment.³⁰ In
19 *Bremerton/Alpine v. Kitsap County*,³¹ the Board found the most appropriate definition of
20 "respond" within the context of RCW 36.70A.140 is "to react in response."

21 Applying this definition means only that citizen comments must be
22 considered, and where appropriate, jurisdictions must take action in
23

24
25 ³⁰ *Keesling v. King County*, CPSGMHB Case No. 07-3-0027, Final Decision and Order, p. 10: "The Board
26 further notes that the Petitioner herself was actively engaged in the public process for the development of the
27 FMHP, including testifying at public hearing and submitting written comment. It is obvious the Petitioner took
28 full advantage of the public process provided by the County.

29 The Board notes that many of the petitions filed with the Board challenge the public *process* of a City or
30 County, when in fact the petitioner does not agree with the *decision* made by the City or County. In two recent
31 cases before the Board (*Cave v. City of Renton*, CPSGMHB Case No. 07-3-0012, Final Decision and Order
32 (July 30, 2007) [p. 8-13] and *Skills, Inc. v. City of Auburn*, CPSGMHB Case No. 07-3-0008c, Final Decision
and Order (July 18, 2007) [p. 9-12]), citizens allege that sections of the GMA related to public participation
have been violated due primarily to disagreement with the final decision. As is the case before the Board in
this matter, the Petitioners in *Cave* and *Skills, Inc.* were aware of the actions the cities were taking and were
active participants in that process. While Petitioners may be disappointed in the outcome of the process,
unless there is a clear violation of GMA provisions, a challenge based on public participation should not be
used as a tool to prolong outcomes of decisions made by a City or County."

³¹ CPSGMHB No. 95-03-0039c/98-3-0032c, Final Decision and Order (Feb. 8, 1999) at 24.

1 response to those comments and questions . . . “Response” may, but need
2 not, take the form of an action, either a modification to the proposal under
3 consideration, or an oral or written response to the [citizen] comment or
4 question.

5 Response to public comments does not require accepting or agreeing with them – only
6 taking them into consideration. For example, in *Hood Canal v. Kitsap County*,³² the Board
7 found the county staff had included petitioners’ proposal in a matrix of alternatives for
8 analysis by the county. It was apparent from the county’s record that the comments were
9 considered “although they were not given the weight to which KAPO believes they were
10 entitled.” The Board commented, “[U]nder the GMA, the County has a duty to provide
11 reasonable opportunity for public input but no duty to accept citizen comments or adopt
12 them.”³³

13
14 In the present case, many of the 2000 comments in the Bainbridge SMP matrix were
15 duplicative; City staff responses in the matrix were necessarily repeated, sometimes to the
16 point of boiler-plate. Some of the comments were merely “noted,” particularly when the
17 issue was a general statement of opinion. Thirty comments on behalf of Futurewise/People
18 for Puget Sound were not responded to at all. Ex. 1939, comments nos. 1247-1277.³⁴ As
19 an alleged public participation failure, the Board must conclude that the few unanswered or
20 “comment noted” responses in the 2000-comment matrix fall within the provisions of RCW
21 36.70A.140:
22
23
24
25

26 ³² CPSGMHB No. 06-3-0012c, Final Decision and Order (Aug 28, 2006), at 14.

27 ³³ *Id.*; see also *Petso II v. City of Edmonds*, CPSGMHB No. 09-3-0005, Final Decision and Order (Aug. 17,
28 2009), at 17 (“The Board has previously explained that ‘consideration and response to public comment’ does
29 not require that the government provide an answer to every question or concern raised by participants . . .
‘response to public comments’ does not mean that each participant’s question must be specifically answered,
but rather, the jurisdiction must take citizen input into consideration in its decision-making”).

30 ³⁴ Answers to Dr. Flora’s 32 comments are perhaps illustrative: several explained the next step in the City’s
31 decision process on that particular issue and the options under consideration, nos. 199, 201, 202, 204, 207;
32 the parameters in the Guidelines applicable to the issue, nos. 46-48, 1187, 208; the multiple ecological
functions served by shoreline vegetation, nos. 46-48, 50-53; and the City’s approach to stormwater
management beyond shoreline jurisdiction, no. 54. Three responses were inaccurately cross-referenced, nos.
203, 205, 205; and two were “comment noted,” nos. 1188, 200. Comments from Dr. Flora in Ex. 1939:
nos.199-208, pp. 33-34; nos. 1187-88, pp. 182-83; nos. 45-54, pp. 228-29.

1 Errors in exact compliance with the established program and procedures
2 shall not render the comprehensive land use plan or development regulations
3 invalid if the spirit of the program and procedures is observed.

4 Beyond the comment matrix, some of the comments resulted in changes to the SMP
5 proposed provisions (e.g., allowing alternatives to native plants in vegetation management).
6 Others, like the nonconformity issue, generated intense planning commission and city
7 council debate. The limited transcripts of City Council meetings provided by the parties here
8 show council members discussing and responding to the issues raised in citizen comments.
9 In some instances, the Council response was to reject the citizen comment, but this does
10 not violate the requirement to “respond to comments.”
11

12 **The Board finds** PRSM has failed to carry its burden of demonstrating the City’s
13 “consideration of and response to public comments” violated SMA or GMA requirements.
14

15 *Requested Transcript of Oral Comments.*

16 Finally, as to public comments, Petitioners argue that the City’s SMP submittal was
17 incomplete because the City did not provide Ecology with a “transcript of oral comments”
18 made during the City work sessions and hearings on the SMP.
19

20 The City responds that WAC 173-26-110(7) states the City must provide “copies of all
21 public, agency and tribal comments received.” City Brief at 13. Here, the City provided
22 Ecology:
23

- 24 (1) all of the public comments received by the Planning Commission and City
25 Council, Ex. 1939, submitted to Ecology as Ex. E-385 and Ex. E-387;
26 (2) matrices summarizing all of the comments received by the Planning
27 Commission and City Council, Ex. 1939, submitted to Ecology as Ex. E-
28 386 and Ex. E-388; and
29 (3) copies of the minutes from all Planning Commission, City Council, ETAC,
30 and SMP Advisory Committee meetings with summarized comments from
31 citizens. See, Exs. E-286 through E-384.³⁵
32

³⁵ These minutes are not produced with the City’s Prehearing Brief because the sole purpose of citing them is to show that they were submitted and not for specific substance within them.

1 PRSM has cited no authority requiring the City to transcribe oral comments for
2 submittal to Ecology. Nor has PRSM adduced any evidence that transcription of oral
3 comments would have provided Ecology with additional or necessary information. The
4 Board notes Ecology certified the City's transmittal as complete. Ex. E-010, p. 18. **The**
5 **Board finds** PRSM has not met its burden of proof on this issue.

6
7 Effective Notice.

8 Petitioners complain the City did not comply with its own rules about advance notice
9 of public hearings; notice was not provided to all shoreline homeowners; notice was
10 sometimes misleading; materials for noticed meetings were not always available; and
11 significant amendments or attachments were added after the time for public comment had
12 closed.

13
14 The SMP guidelines require "public meetings after effective notice." WAC 173-26-
15 090. PRSM points to the November 20, 2013 City Council public hearing as one for which
16 notice was misleading. PRSM states the hearing notice published November 8 stated the
17 matter for consideration was a *repeal* of the SMP, rather than *adoption* of the SMP update.³⁶
18 The November 8, 2013 notice says:

19
20 NOTICE IS HEREBY GIVEN that the Bainbridge Island City Council will
21 conduct a public hearing to consider Ordinance No 2013-34, *adopting the*
22 *City of Bainbridge Island Shoreline Master Program Update*, including
23 adopting the new shoreline designations map and amending goals, policies,
24 and regulations; amendments to the Comprehensive Plan; amendments to
25 Chapters 2.14, 2.16, 18.12, 18.36 of the Bainbridge Island Municipal Code;
26 *and repealing Chapter 16.12 of the Bainbridge Island Municipal Code and*
27 *adopting a substitute Chapter 16.12 in its place.*³⁷

28 The Board agrees with the City: the notice was clear; no one could have been misled, and
29 certainly the Petitioners were not.

30 More significantly, the question of adequacy of public notice arises from conflicting
31 provisions of the City's public participation plan for the SMP update and the City's prior SMP
32 amendment process codified at BIMC 16.12.400. Ex. E-197. BIMC 16.12.400 required

³⁶ PRSM Brief at 6.

³⁷ Ex. 1956. Emphasis added.

1 public notice in the newspaper once in each of three weeks prior to a public hearing before
2 amendment of the master program.

3 The provisions of the master program may be amended as provided for in
4 RCW 90.58.120. . . The city council shall approve, modify, or deny . . . an
5 amendment after conducting at least one public hearing to consider the
6 proposal. Prior to conducting the hearing, the city shall publish notice of the
7 hearing a minimum of once in each of the three weeks immediately
8 preceding the hearing in one or more newspapers of general circulation in
the area in which the hearing is to be held.³⁸

9 The City's Public Participation Plan for the SMP, adopted under WAC 173-26-090,
10 states:

11 The public will be notified in a timely manner about all meetings and key
12 decision points so that they have the opportunity to plan an active and
13 influencing role throughout the process. *Generally this means at least 10*
14 *days' notice, and generally 14 days' notice.* Ex. E-250, p. 11(emphasis
15 added)

16 Throughout the four-year SMP update development, the City apparently applied the
17 rule from its SMP public participation plan, giving notice generally 10-14 days prior to a
18 meeting. Petitioner Young brought the codified requirement for three weeks' notice to the
19 City Council's attention just prior to the November 20, 2013 public hearing.³⁹ The November
20 hearing went forward, as the City had been alerted Ecology would have more changes to
21 the program and the SMP was thus not ready for final amendment.⁴⁰ The November 20
22 hearing was not the final public hearing. The City held a final public hearing on the entire
23 SMP on July 14, 2014 for which notice was published June 27, July 4 and July 11. Ex.
24 2114.
25

26 It appears to the Board the City relied on the provisions of its SMP public participation
27 plan (PPP) as setting the parameters for notification "in a timely manner about all meetings
28 and key decision points." The PPP set 10-14 days' notice as calculated to give citizens "the
29
30

31 ³⁸ BIMC 16.12.400, cited in E-197.

32 ³⁹ Ex E-197, November 17, 2013.

⁴⁰ This hearing gave the public an additional opportunity to comment on "city staff's recommended language amendments and corrections that were incorporated into the document prior to submittal to the Department of Ecology on June 10, 2013." Ex. 1956.

1 opportunity to plan an active and influencing role throughout the process.” Ex. E-250, p. 11.
2 With planning commission or city council study sessions set almost monthly over the course
3 of two years, three weeks’ advance notice and availability of materials for each meeting
4 would not be feasible. The Board is not persuaded the City’s application of its PPP notice
5 process was clearly erroneous.

6 This is not inconsistent with BIMC 16-20-400, which required public notice once in
7 each of three weeks prior to a hearing to *amend* the SMP. The Bainbridge SMP was
8 *amended* by the adoption, after citizen input and Ecology approval, of the updated SMP in
9 July, 2014.

10 In its reply brief, PRSM alleged notice of the May 8, 2013, public hearing on submittal
11 of the SMP to Ecology was limited to two public notices. PRSM Reply at 10, Ex. 2082. This
12 conflicts with Ecology’s findings which state: “Legal ads for this public hearing were
13 published in the Bainbridge Island Review for three consecutive weeks beginning on April
14 16, 2013, and ending on May 3, 2013.” Ex. E-010, p. 17.⁴¹ In any event, Petitioners had
15 subsequent opportunity at the November 20, 2013 and the properly noticed July 14, 2014
16 hearings to make additional comments.

17 Petitioners further contend the City should have provided individual mailed notice to
18 all shoreline homeowners.⁴² Petitioners provide no authority for such a requirement. Neither
19 the SMP guidelines nor incorporated GMA provisions require individual notice of planning
20 actions.⁴³ Our courts have ruled that the GMA provisions for notice and public participation
21 do not require individual notice. In *Holbrook, Inc., v. Clark County*, 112 Wn. App. 354, 49
22 P.3d 142 (2002) the court found that neither the RCW 36.70A.035 provision for “notice
23 procedures that are reasonably calculated to provide notice to property owners” nor the
24 RCW 36.70A.140 provision for “public meetings after effective notice” required individual
25
26
27
28

29
30 ⁴¹ The Board need not resolve this question, which was only raised on reply.

31 ⁴² PRSM Brief, at 9, referencing Supp. Ex. 13.

32 ⁴³ *Fuhrman v. City of Bothell*, CPSGMHB Case No. 05-3-0025c, Final Decision and Order (August 29, 2005),
at 13 (The GMA does not require notice to property owners.) See also, *Snohomish County Farm Bureau v. Snohomish County*, Case No. 12-3-0010, Order on Motions (January 31, 2013), at 6. “The Farm Bureau has failed to cite any authority for a requirement that the proposed amendments be individually “disseminated” to the 13 listed persons [with direct interests in the challenged projects].”

1 notice to individual landowners. The *Holbrook* reasoning applies equally to shoreline master
2 program planning procedures.⁴⁴

3 **The Board finds** Petitioners have not carried their burden of demonstrating the City's
4 public notices violated the SMA or the applicable guidelines.

5
6 *Dissemination of Informative Materials.*

7 The Guidelines at WAC 173-26-090 require "broad dissemination of informative
8 materials, proposals and alternatives." Petitioners contend drafts of SMP provisions were
9 not uniformly available before meetings, and last-minute changes hampered public review.
10 Similar complaints were raised in *Hagwell v. City of Poulsbo*, GMHB Case No. 12-3-0006,
11 Final Decision and Order (March 11, 2013) at 10-11, where petitioners claimed the city
12 repeatedly modified documents during the adoption process without timely notice and that
13 maps were unreadable on the website. In the case before us, as in *Hagwell*, the City cured
14 the complained-of problems.

15
16 In the Board's experience, even the best-managed city or county planning process
17 will encounter glitches, particularly when council members and staff before a final vote are
18 scrambling to incorporate provisions responding to public concerns. RCW 36.70A.140
19 wisely provides:

20
21 Errors in exact compliance with the established program and procedures
22 shall not render the comprehensive land use plan or development regulations
23 invalid if the spirit of the program and procedures is observed.

24
25 **The Board finds** Petitioners have failed to demonstrate violation of the requirement
26 for dissemination of meeting materials.

27
28 *Late Amendments or Additions.*

29 Petitioners raise a host of objections to the SMP voted on by the City Council May
30 15, 2013 for submission to Ecology. Ecology points out the submittal SMP was adopted by
31

32

44 The Board notes staff response to citizen comment no. 474 (6/28/11): "A postcard notification of the update process with information on how to provide comments and stay informed was mailed to every shoreline property owner." Ex. 1939.

1 Resolution, not by ordinance, as the Council noted there would likely be more changes as a
2 result of Ecology's review. Ex. E-013, p. 17. Petitioners object that the SMP sent to Ecology
3 in June 2013 contained numerous late amendments or additions that had not been properly
4 noticed or available for public review. At its May 15 meeting following a May 8 public
5 hearing, the City Council deliberated and voted on individual council members' changes
6 proposed in response to public comments. The council agreed that further changes were
7 limited to clarification, syntax, grammar, internal consistency, and consistency with WAC
8 173-26. *Id.* Nevertheless, PRSM states there were substantive changes to the submittal
9 SMP before it was forwarded to Ecology for review.

11 PRSM objects to late additions of:

- 12 • Section 7 of the SMP (Violations, Enforcement and Penalties)
- 13 • Appendices B, C, and D
- 14 • Insertion of SMP definition for "Existing Development." SMP p. 273.

16 The Board notes, first, that PRSM had over a year to review and comment on the
17 submittal SMP from its preliminary adoption by City Council May 15, 2013 until its final
18 adoption and approval in July 2014. During that time Ecology held a public hearing in
19 Bainbridge, July 31, 2013, at which petitioners Linda Young, Dick Haugan, Gary Tripp and
20 attorney Dennis Reynolds provided comment. Ex. E-131. The City held a limited public
21 hearing November 20, 2013, and a final public hearing May 13, 2014. Petitioners raised
22 their objections in each of these hearings and by written comments.⁴⁵

24
25 SMP Section 7.

26 Petitioners specifically complain that Section 7 of the SMP (Violations, Enforcement
27 and Penalties) was not heard by the planning commission and not specifically listed on the
28 agenda of any council study session. Nor was it attached to the draft of the SMP provided
29 for the May 8, 2013 public hearing. Thus they assert its adoption as part of the May 15,
30 2013 submittal SMP violated public process requirements. PRSM Brief, at 9-10. Petitioners
31

32 ⁴⁵Ex. E-113, Ecology Response to Public Comments, identifies 21 topics in its public comment after the SMP submittal, of which Topics 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 were raised by these petitioners or Dennis Reynolds.

1 assert the Planning Commission had no opportunity to look at Section 7 because it was
2 added *after* the Planning Commission had completed review of the SMP draft. Ex.1780, p.
3 5 and attachment B; Ex.1830. According to Petitioners, the first time draft Section 7 was
4 available to the public was in the agenda packet for the City Council's March 13, 2013 study
5 session, but it was not addressed by the public or City Council. Ex. 1793. At the April 10,
6 2013 study session, the Council approved Section 7 even though not referenced in the
7 notice or agenda, according to Petitioners. Ex.1859. The City points out the staff
8 memorandum for the March 13, 2013 City Council study session indicates the proposed
9 changes to Section 7 were incorporated into a public hearing draft that was sent to City
10 Council and made available on the City's website three weeks in advance of the May 8,
11 2013 public hearing. Ex.1780, p. 5. The Board notes the Section 7 changes were before the
12 City Council at its March 13 study session, referenced in the staff memorandum, and
13 available for public review on the website. That Section 7 was not actually discussed during
14 the study session or subsequent Council meetings does not create a public process
15 violation.
16

17
18 Ecology's Findings state:

19 The omission of this section [7] from the copy of the SMP used in the May 8,
20 2013 public hearing was inadvertent. This section was not new and had
21 appeared in all other versions of the draft SMP and had been previously
22 discussed and voted on in hearings held prior to and after May 8, 2013.
23 Section 7 was also included in the SMP for the Ecology state public hearing
24 on July 31, 2013.⁴⁶

25 **The Board finds** Petitioners have not met their burden to prove they did not have
26 adequate notice of, or opportunity to review, Section 7 of the SMP.

27 Appendices B, C, and D.

28
29 Petitioners contend the updated SMP submitted to Ecology on June 10, 2013
30 contained appendices that had not been made available to the public in a timely manner or
31 subject to public review before adoption. The Board's review of the record indicates
32

⁴⁶ Ex. E-010, p. 26.

1 Appendix B "Critical Areas" was presented with the draft SMP at the Planning Commission
2 public hearing March 12, 2012. Ex.1266, footer. Appendix C "Buffer Recommendation
3 Memorandum" was provided at the same public hearing, Ex. 1267, footer, and was
4 discussed at length at a city council study session August 16, 2011. Ex. 2116. Appendix C
5 includes the entirety of the August 11, 2011 Memorandum from Herrera Environmental
6 Consultants, as well as an August 11, 2011 cover memorandum from City Planning Staff to
7 the Bainbridge Island City Council.
8

9 When the Planning Commission made its recommendation to the City Council on
10 April 12, 2012, it recommended "the Shoreline Master Program as amended (by motion and
11 matrices A, B, C, and D) to City Council for approval." Ex. E-360, p. 4. Petitioners fault the
12 City for not offering the appendices to the public at any public hearing, but the Herrera
13 memoranda, at least, had been publicly discussed at Planning Commission and City Council
14 study sessions in August 2011, well before the Commission sent its recommendations to the
15 Council. See Ex. 2116. PRSM's objection is hardly credible. The City adds that the
16 Petitioners, in any event, had ample opportunity to comment on the appendices after their
17 submission to Ecology in June 2013 up until the final City Council public hearing July 2014.
18

19 Ironically, Petitioners' primary objection to the Herrera August 11, 2011 memorandum
20 in Appendix C is that Herrera acknowledges the City's intention to balance buffer science
21 with the City's policy priorities.⁴⁷ The policy asserted was the City's desire to limit the
22 number of shoreline properties that might become nonconforming under the most-protective
23 buffer science. Petitioners' outrage about inclusion of policy considerations is unpersuasive.
24

25 **The Board finds** inclusion of Appendices B, C, and D did not violate public
26 participation requirements.
27

28 *Definition of "Existing Development."*

29 Finally, PRSM argues that the City violated the public participation provisions of the
30 SMA by adding a definition of "existing development" after the close of public testimony May
31

32 ⁴⁷ As discussed more fully below, buffer delineation is a combination of science and policy. Applicable science recommends ranges, and decisions on actual distances, such as buffer widths, become policy choices within those ranges.

1 15, 2013. From PRSM's viewpoint, "after the City Council meeting, staff decided to "clean
2 up" the SMP by adding a definition of "existing development" that equates "existing" to
3 "nonconforming." That definition showed up in the draft sent to DOE.

4 Existing Development – **Legally established structures which do not**
5 **conform** to the provisions in the 1996 Shoreline Master Program, as amended
6 by ordinance 2013- on xx xx, 2013.

7 SMP at 237 (emphasis added). This action has led to a seriously flawed and confusing
8 provision in the SMP." PRSM Brief, at 12.

9 From the City's viewpoint, while acknowledging the definition was added by staff after
10 the meeting and just before transmittal to Ecology, the definition was well within the range of
11 alternatives available for comment at the public hearing on May 8, 2013. City Brief, at 10-11.
12 More importantly, as the Board sees it, the proposed change "clarifies language of a
13 proposed ordinance or resolution without changing its effect."⁴⁸

14 As the result of numerous study sessions prior to the public hearing, the City Council
15 on March 13, 2013 had voted to deal with the issue of nonconforming structures by
16 renaming them "existing development." Ex. E-310 at 4. The minutes of the City Council
17 study session on March 13, 2013, indicate the council adopted an amendment to the SMP
18 providing that "*non-conforming structures* will now become *existing development*." Ex. 1794,
19 p. 4. Staff was directed to replace the term "nonconforming" with "existing development"
20 throughout the document where it applied to residential structures. In keeping with this
21 action, the draft SMP available to the public for the May 8 hearing included a change in the
22 subsection heading SMP §4.2.1, in which the words "nonconforming structure" had been
23 replaced with the words "existing development." The definitions section of the draft SMP did
24 not contain a definition of "existing development," but did include a definition of
25 "nonconforming development" that reads:

26 **Nonconforming Development** - A shoreline use or structure which was
27 lawfully constructed or established prior to the effective date of the applicable
28 Shoreline Management Act/SMP provision, and which no longer conforms to
29 the applicable shoreline provisions. [WAC 173-27-080(1) or its successor].
30
31
32

⁴⁸ RCW 36.70A.035(2)(b)(iii).

1 SMP at 248.

2 On May 15, 2013, the City Council approved a proposal by the City's Shoreline
3 Planner to "clean up the use of the term 'existing development' in place of 'nonconforming
4 structure.'" Ex. 2084; Ex. 1932, Minutes, May 15, 2013, p. 6. In carrying out the Council's
5 action, the Shoreline Planner created a definition of "existing development" that simply
6 reworded the "nonconforming development" definition to apply to structures only and that
7 tied application of the term to the SMP update that the Council voted to send to DOE:
8

9 **Existing Development** - Legally established structures which do not
10 conform to the provisions of the 1996 Shoreline Master Program, as
11 amended by ordinance 2013 - on xx xx, 2013.⁴⁹

12 When the wording of the "existing development" definition is superimposed on the section
13 heading: SMP §4.2.1. Nonconforming Use, Nonconforming Lots, Existing Development, or
14 applied to the subsection: § 4.2.1.6. Regulation – Existing Development, it is apparent the
15 definition simply clarifies the language of the provisions without changing their effect. The
16 change was within the scope of the alternatives available for discussion at the public
17 hearing on May 8, 2013 and within the authorization provided by the Council on May 15,
18 2013.
19

20 RCW 36.70A.035(2)(a)⁵⁰ provides that a city or county council must provide an
21 additional opportunity for public review and comment if it chooses to consider a change to
22 an amendment to its comprehensive plan or development regulations after the opportunity
23 for review and comment has passed. However, an additional public hearing is not required if
24 "the proposed change is within the scope of the alternatives available for public comment,"
25 RCW 36.70A.035(2)(b)(ii), or "the proposed change only . . . clarifies language of a
26 proposed ordinance or resolution without changing its effect." RCW 36.70A.035(2)(b)(iii).
27 These GMA provisions are the legislature's common sense recognition that a city council's
28
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30

31 ⁴⁹ At the time the language was inserted, the City contemplated final approval of the SMP by DOE and final
32 adoption by the City Council in 2013; in the end, that did not take place until 2014 and so the reference will
have to be updated on codification.

⁵⁰ The Board recognizes RCW 36.70A.035(2) is not expressly incorporated into the SMP Guidelines for public
participation and is merely instructive here.

1 work is never-ending if every time the council amends its plan in response to public
2 comments it must hold another public hearing to take comments on the amendment.

3 Here Bainbridge City Council made an explicit direction to staff in open session
4 following a public hearing. In response to the concerns of these petitioners that the
5 “nonconforming” label was offensive, the Council on the record in the March 13, 2013 study
6 session had directed staff to use the term “existing development” in place of “nonconforming
7 structure.” The subsequent text correction providing a definition was well within the scope of
8 public discussion. That the text is not worded as petitioners preferred, or even that it makes
9 the SMP confusing, is not grounds for requiring an additional public hearing.⁵¹

11 **The Board finds** Petitioners have failed to demonstrate the City’s addition of the
12 “existing development” definition after the May 8, 2013 public hearing was a violation of
13 SMA public participation requirements.

14 In sum, **the Board finds** Petitioners have failed to carry their burden of
15 demonstrating non-compliance with the SMA or the guidelines in the City’s or Ecology’s
16 public process for adoption and approval of the Bainbridge Island SMP.

18
19 I-3. **Whether the City is not in compliance with RCW 90.58.100(2)(a) in failing**
20 **to utilize information and consider the economic impact of proposed**
21 **provisions in the update process. PFR 29.**

22 This issue has apparently been abandoned by PRSM and the Realtors. The Board
23 notes RCW 90.58.100(2)(a) is the requirement for an economic development element, not
24 for an economic impact analysis. Utilizing and considering economic impacts of an SMP
25 might be found under RCW 90.58.100(1)(a) and (e), but neither of the opening briefs
26 addresses these provisions.⁵² Legal Issue I-3 is **abandoned** and is **dismissed**.

28
29 ⁵¹ In any event, Petitioners also had the opportunity to comment on the definition at Ecology’s July 31, 2013
hearing, the City’s November 20, 2013 hearing, and the July 14, 2014 final public hearing.

30 ⁵² Petitioners’ exhibits and comments before both the City and Ecology are replete with assertions that the
31 SMP update and, in particular, the non-conforming status of some shoreline residences would reduce property
32 values. Not only would homeowners suffer loss, but realtors and associated financial services would be
jeopardized. See, e.g., Ex. E-33-009, E-33-187-88. Neither the Petitioners nor the Intervenor cite any data in
the record to justify their fears. Petitioners report: “One City Councilmember stated that mortgage brokers
have told him that they would not lend to finance purchase of nonconforming properties. March 13, 2013 Tr. at
58.” PRSM Brief at 34.

1 I-4. Whether the City failed to comply with RCW 90.58.100(1) and WAC 173-
2 26-201 in failing to assemble and appropriately consider technical and
3 scientific information and to base master program provisions on
4 objective evaluation of conflicting scientific data. PFR 60.

5 **Applicable Law**

6 **RCW 90.58.100(1)** requires a city, in developing or amending a shoreline master
7 program, "shall to the extent feasible:

8 (a) Utilize a systematic interdisciplinary approach which will insure the
9 integrated use of the natural and social sciences and the environmental design
10 arts;

11 . . .
12 (c) Consider all plans, studies, surveys, inventories, and systems of
13 classification made or being made by federal, state, regional, or local agencies,
14 by private individuals, or by organizations dealing with pertinent shorelines of
the state;

15 (d) Conduct or support such further research, studies, surveys, and interviews
16 as are deemed necessary;

17 (e) Utilize all available information regarding hydrology, geography, topography,
18 ecology, economics, and other pertinent data.

19 The Guidelines further clarify this requirement in **WAC 173-26-201(2)(a)** Use of
20 Scientific and Technical Information:

21 First, identify and assemble the most current, accurate, and complete scientific
22 and technical information available that is applicable to the issues of concern.
23 The context, scope, magnitude, significance, and potential limitations of the
24 scientific information should be considered. At a minimum, make use of and,
25 where applicable, incorporate all available scientific information, aerial
26
27

28 The record supports the opposite conclusion. The Board notes 35% of Bainbridge shoreline homes are
29 nonconforming under the prior SMP (based primarily on lot size or distance from the shore).
30 The City undertook a study of Bainbridge Island waterfront home sales for purposes of evaluating whether
31 nonconforming status reduced property values. Ex. E-010, Attachment A: *Findings and Conclusions for*
32 *Proposed Comprehensive Update of the City of Bainbridge Island Shoreline Master Program* (June 18, 2014),
p. 20. The study compared assessor values and sale prices over a period of one year and found no
devaluation of home value on the market consistent with whether a home was conforming or nonconforming
with SMP setback and buffer requirements. The study found that nonconforming status did not affect
waterfront home values on the market nor in valuation by the assessor. Ex. E-013, Ecology Response to
Public Comment, Topic 1, pp. 1-2.

1 photography, inventory data, technical assistance materials, manuals and
2 services from reliable sources of science. . . .

3 Second, base master program provisions on an analysis incorporating the most
4 current, accurate, and complete scientific or technical information available.
5 Local governments should be prepared to identify the following:

- 6 (i) Scientific information and management recommendations on which
7 the master program provisions are based;
8 (ii) Assumptions made concerning, and data gaps in, the scientific
9 information; and
10 (iii) Risks to ecological functions associated with master program
11 provisions. Address potential risks as described in WAC 173-26-201
12 (3)(d).

13 The requirement to use scientific and technical information in these
14 guidelines does not limit a local jurisdiction's authority to solicit and
15 incorporate information, experience, and anecdotal evidence provided by
16 interested parties as part of the master program amendment process. Such
17 information should be solicited through the public participation process
18 described in WAC 173-26-201 (3)(b). Where information collected by or
19 provided to local governments conflicts or is inconsistent, the local
20 government shall base master program provisions on a reasoned, objective
21 evaluation of the relative merits of the conflicting data.

22 **Statement of Facts – Scientific and Technical Information**

23 In developing its SMP update, Bainbridge Island assembled scientific and technical
24 information, beginning with the engagement of Battelle Marine Science Laboratory, Sequim,
25 for a nearshore assessment. Battelle first provided a summary of best available science,
26 *Bainbridge Island Nearshore Assessment Summary of Best Available Science* (Battelle
27 2003), Ex. 4, and then a habitat characterization and assessment, *Bainbridge Island*
28 *Nearshore Habitat Characterization and Assessment, Management Strategy Prioritization,*
29 *and Monitoring Recommendations* (Battelle 2004),⁵³ Ex. E-147. Subsequently, the City
30 engaged Coastal Geologic Services, Inc. for complete geomorphic mapping of the island's
31 53 miles of marine shorelines. *Bainbridge Island Current and Historic Coastal Geomorphic/*
32

⁵³ Also cited as Williams, G.D., R.M. Thom and N.R. Evans (2004).

1 *Feeder Bluff Mapping* (Coastal Geologic Services, Inc. 2010), Ex. 117.⁵⁴ These studies
2 provided Bainbridge with reach-by-reach documentation of the geomorphic conditions of its
3 shores and detailed identification of aquatic and terrestrial flora and fauna in nearshore,
4 intertidal, and supratidal zones around the island as a base line for its SMP.

5 The City's Environmental and Technical Advisory Committee (ETAC) also provided
6 input on development of the SMP. As explained by the City's attorney at hearing, ETAC is a
7 standing committee of Bainbridge residents appointed by the City Council and selected for
8 their range of scientific expertise. ETAC holds monthly meetings open to the public
9 evaluating scientific questions and, in this case, providing advice and comment on the
10 SMP.⁵⁵ For example, on August 4, 2011, ETAC submitted a memorandum listing known
11 ecological functions of marine riparian vegetation along with data gaps and areas of
12 uncertainties. Ex. 938.

13
14 The City engaged Herrera Environmental Consultants, Inc. to update the 2003
15 Battelle summary of best available science and provide recommendations for Bainbridge-
16 specific marine buffers. In January 2011, Herrera provided its *Addendum to the Summary of*
17 *Science Report*.⁵⁶ The buffer recommendations were discussed at planning commission
18 and city council meetings in August 2011,⁵⁷ with Buffer Recommendation Memorandums
19 laying out scientific and planning considerations from the consultants and City planning
20 staff.⁵⁸

21
22 The buffer system adopted in the City's SMP is a two-zone system. SMP, p. 325.
23 Zone 1 is a Riparian Protection Zone (RPZ) which, for most of the island, is 30 feet upland
24 from OHWM. Protection of existing native riparian vegetation canopy is required in this
25 zone. A second less-restrictive Zone 2 buffer provides lesser protections, allowing decks,
26
27

28 ⁵⁴ Also cited as MacLennan, A., J. Johannessen, and S. Williams (2010).

29 ⁵⁵ See, DOE's Index of Record, Exs. E-312 through E-327 and E-330 through E-335. ETAC minutes are in the
30 City's and Ecology's record but none were submitted to the board as exhibits.

31 ⁵⁶ *City of Bainbridge Island Addendum to the Summary of Science Report* (Herrera Environmental Consultants
32 2011), Ex. 506.

⁵⁷ SMP Appendix C, Buffer Recommendations Memorandums, August 2, 2011, August 11, 2011, August 31,
2011; Ex. 2116, Transcript, City Council Study Session, August 16, 2011.

⁵⁸ *Documentation of Science Buffer Recommendation Discussions* (Herrera Environmental Consultants, Inc.
August 11, 2011), Ex. 912; and *Clarification on Herrera August 11, 2011 Documentation of Marine Shoreline*
Buffer Recommendation Discussions Memo (Herrera Environmental Consultants August 31, 2011), Ex. 989.

1 gardens, and some amount of impervious surface. As applied to each of the shoreline
2 designations:

3 The Natural designation applies to ecologically intact shorelines free of
4 structures, modifications or intense uses. These areas have large buffers of
5 200 feet to protect existing functions.

6 The Island Conservancy designation applies to publicly-owned open space
7 or park properties and requires buffers of 150 feet for shorelines with 65%
8 intact vegetated canopy, and to undeveloped Island Conservancy lots with
9 buffers of 100 feet for lots with less than 60% canopy.

10 The Shoreline Residential Conservancy designation applies to residential
11 lots. Developed lots with less than 65% canopy area require a 75-foot buffer;
12 for developed lots with 65% canopy, 115 feet; and a 150-foot buffer for
13 undeveloped lots.

14 The Shoreline Residential designation applies to residential lots and requires
15 75-foot buffers for undeveloped lots or 150-foot buffers for undeveloped lots
16 adjacent to Priority Aquatic designation and 50-foot buffers for developed lots
17 with less than 65% existing canopy area in Zone 1 or lots with a depth less
18 than 200 feet or on a high bluff.

19 The Urban designation applies to the downtown Winslow area, Washington
20 state ferry facilities and several other highly developed areas. Minimum total
21 buffers of 30 feet are required.

22 Marine shoreline buffers regulate areas to protect the marine nearshore from the
23 effects of land use activities (construction of buildings, driveways, other infrastructure). SMP
24 Appendix C, p. 318. The SMP buffer system is based on analysis of the available science
25 on buffers, considered in light of local conditions and anticipated future development on the
26 Island. Ex. E-010, Ecology Findings, p. 21-23. The Shoreline Buffer Standards Table, SMP,
27 p. 66, Table 4.3 is appended to this Order as Appendix A, with the Native Vegetation Zones
28 of the prior SMP shown also for comparison.⁵⁹
29
30
31

32 ⁵⁹ The prior marine shoreline buffers for residential uses are shown on Ex. 912, Herrera Environmental
Consultants, August 11, 2011, Documentation of Marine Shoreline Buffer Recommendations Discussion,
Attachment A, Current Marine Shoreline Buffer Requirements and Allowed Buffer Uses in the City of
Bainbridge Island, at A-2.

1 Don Flora is a retired forest ecology researcher and Bainbridge shoreline resident.
2 He has Ph.D.'s in Forest Ecology Research and in Economics. Dr. Flora's experience
3 includes 30 years in the Forest Service, overseeing laboratories in the Pacific Northwest,
4 and personal experience with salt water science based on decades participating in a family
5 shellfish operation.⁶⁰ Throughout the development of the Bainbridge Island SMP, Dr. Flora
6 provided multiple white papers to city staff, ETAC, the planning commission and city
7 council.⁶¹ Dr. Flora's papers critiqued the consensus science about marine shoreline
8 management.
9

10 **Board Discussion and Analysis**

11
12 Petitioners allege: "The City is not in compliance with RCW 90.58.100(1) and WAC
13 173-26-201 by failing to identify and assemble the most current, accurate, and complete
14 scientific and technical information available, by failing to consider the context, scope,
15 magnitude, significance, and potential limitations of the scientific information, and by failing
16 to make use of and incorporate all available scientific information." In particular, petitioners
17 state the City ignored science in regard to:
18

- 19 a. The need and effectiveness of marine shoreline buffers for single family
20 residential use;
- 21 b. The contribution to pollution from City streets and leaks from the City's
22 sewer system;
- 23 c. The fact that the buffers selected were not driven by science-based
24 information but by City policy unrelated to science;
- 25 d. Conflicting conclusions are drawn from the same scientific information to
26 support policy-driven choices;
- 27 e. The master program provisions are not based on a reasoned, objective
28 evaluation of the relative merits of the conflicting scientific data.

29 **A. Buffers for Puget Sound marine shores with upland residential uses.**

30 Petitioners' primary attack on the City's SMP buffer system is the argument that
31 buffer widths were based (a) on pollution control effectiveness for buffers on feedlots and
32

⁶⁰ Declaration of Don Flora in Support of Motion to Supplement the Record, December 15, 2014, p. 1-2.

⁶¹ Dr. Flora papers in the record include Supp. Ex. 16-20, Exs. E-186-89, E-191, E-192, E-195, 640, 871, 872, 938, 994, 1710, 1711, 1713.

1 farms in the Midwest, not based on residential pollution sources, and (b) on habitat impacts
2 of upland activities, primarily forestry, above freshwater lakes and streams, not marine
3 shores. PRSM Brief at 20, citing Flora white papers, Ex. 186,189, 192, and ETAC memo,
4 Ex. 938. The actual width of the SMP buffers is not challenged here, just the source and
5 appropriateness of the science on which the City's consultant and ETAC relied. In Legal
6 Issue I-4 Petitioners allege the City failed "to assemble and appropriately consider technical
7 and scientific information."

9 The Board notes Herrera's Addendum to the Summary of Science Report, Ex. 506,
10 derives information primarily from studies published since the Battelle 2003 report and
11 conducted in Puget Sound and the Salish Sea.⁶² In addition to the studies cited in the
12 Addendum itself, Ecology provides a 19-page bibliography of "Literature Cited in SMP
13 Update Background Documents." Ex. E-014. Virtually all of the listed sources concern the
14 marine environment and eight out of ten are specific to Puget Sound or the Salish Sea.
15 While a good scientist will always call for more studies, it appears to the Board the coastal
16 processes and ecological resources and relationships that characterize Bainbridge
17 shorelines are not the enigma that PRSM would suggest.

19 The Herrera Addendum cites current, Pacific Northwest marine shoreline analysis
20 indicating "[w]ithout adequate marine riparian protection, [ecological functions] and key
21 natural processes become degraded." Addendum at 70.⁶³ ETAC condenses the

23 ⁶² Addendum, p. 2: "Recent science addressing the effects of the three types of nearshore modifications
24 [shoreline stabilization, vegetation changes, and residential development] was analyzed. . . . [S]cientific
25 literature involving all aspects of shoreline processes and ecology relevant to Puget Sound, in particular the
26 main basin, Dyes Inlet, and related passages, were examined. These processes were placed within the
27 context of a limited set of human modifications that were identified by the City [again: shoreline stabilization,
28 vegetation changes, and residential development]. Finally the effects of human modifications were assessed
29 by comparing such modifications to similar land-use practices and their related impacts to the marine
30 nearshore environment found in the Salish Sea of Western Washington, or comparable environments
31 elsewhere."

32 ⁶³ Citing Brennan, J.S. and H. Culverwell. *Marine Riparian: An Assessment of Riparian Functions in Marine
Ecosystems*. Washington Sea Grant Program, University of Washington, 2004; Brennan, J. H. Culverwell, R.
Gregg, P. Granger. *Protection of Marine Riparian Functions in Puget Sound, Washington*. Washington Sea
Grant, for WDFW, 2009; Lemieux, J.P., J.S. Brennan, M. Farrell, C.D. Levins, and D. Myers. *Proceedings of
the DFO/PSAT Sponsored Marine Experts Workshop*. Tsawwassen, British Columbia, 2004; Sobocinski, K.L.
The Impact of Shoreline Armoring on Supratidal Beach Fauna of Central Puget Sound. M.S. thesis, University
of Washington, 2003; Romanuk, T.N. and C.D. Levings. *Associations Between Arthropods and the
Supralittoral Ecotone: Dependence of Aquatic and Terrestrial Taxa on Riparian Vegetation*. Environmental

1 Addendum's long list of ecological functions to six: water quality, fish and wildlife habitat,
2 control of erosion and sediment supply, shading and microclimate, food source, and large
3 woody debris (driftwood) recruitment. Ex. 938.

4 Water quality is one of the ecological functions and processes protected by marine
5 riparian buffers. Herrera's Addendum indicates, because the Bainbridge shoreline is
6 primarily developed with low density residential use, "sources of sediment and other
7 pollutants are predominantly from impervious surfaces, gravel and dirt roads, septic
8 systems, and outside household chemical use." Addendum at 73. Analysis in the Addendum
9 addresses these pollutants, not farm and feedlot residues.
10

11 As to the relationship between freshwater riparian functions and marine riparian
12 functions, Herrera's August 2, 2011 memorandum to planning staff explains:

13 Much of the existing riparian and buffer literature is related to freshwater
14 systems, therefore, Washington Department of Fish and Wildlife established
15 a panel of scientists in 2008 to assess the freshwater riparian scientific
16 literature to determine its applicability to marine shoreline systems. The result
17 of the literature review, and the Marine Riparian Workshop proceedings
18 conducted by the scientific panel in 2008 was a common consensus that
19 freshwater riparian buffer research was *conceptually applicable* to marine
20 shorelines [Brennan, et al. *Protection of Marine Riparian Functions in Puget
Sound, Washington*. Washington Sea Grant, for WDFW, 2009.]

21 SMP Appendix C, p. 320. Nonetheless, the Addendum calls for "more focused studies that
22 apply to marine shorelines and that are specific to the shoreline conditions and typical land
23 uses found in the city of Bainbridge Island." *Id.* at 71.

24 Petitioners have failed to establish that the buffer widths proposed for the Bainbridge
25 SMP were based on farm and feedlot data or were inappropriately based on freshwater
26 rather than marine data. **The Board finds** they have not met their burden to establish a
27 failure "to assemble and appropriately consider technical and scientific information" in
28 regard to buffer widths.
29
30

31 Entomology 32(6): 1343-1353, 2006; Romanuk, T.N. and C.D. Levings. *Relationships Between Fish and*
32 *Supralittoral Vegetation in Nearshore Marine Habitats*. Aquatic Conservation: Marine and Freshwater
Ecosystems 16:115-132, 2006; Sobocinski, K.L., J.R. Cordell, and C.A. Simonstad. *Effects of Shoreline*
Modifications on Supratidal Macroinvertebrate Fauna on Puget Sound, Washington Beaches. Estuaries and
Coasts 33(3): 699-711, 2010.

1 **B. Pollution to Puget Sound from City streets and sewer systems.**

2 PRSM contends the City's SMP ignores the contribution of street stormwater runoff and
3 sewer overflows to the pollution of the Bainbridge shorelines and Puget Sound. PRSM Brief, at
4 20. Petitioners' brief provides no scientific basis for its assertion, citing only to a comment by a
5 shoreline resident who spoke of a sewer spill or spills in Eagle Harbor within the last 11 years.
6 Ex. 2112, pages 12-13.⁶⁴ This single comment fails to meet Petitioners' burden of proof. If
7 there is science-based support for Petitioners' argument, PRSM has failed to point to it.
8

9 The Herrera Addendum, as spelled out above, addresses septic system leakage and
10 stormwater runoff from upland residences in the shoreline jurisdiction. Addendum, pp. 62-63.
11 The larger tasks of maintenance of the City's sewer system and meeting the NPDES
12 requirements for managing runoff from city streets are appropriately addressed under
13 regulatory systems applicable to the whole City.⁶⁵ Thus the SMP requires compliance with the
14 City's Stormwater Management Manual, BIMC 15.20, which has been specifically approved as
15 meeting the requirements of the Clean Water Act through DOE's approved NPDES permit
16 WAR04-5503 for Bainbridge Island. SMP at 111, §4.1.6.6.1; Ex. E-010 at 15. City Brief at 20-
17 21.⁶⁶
18

19 **The Board finds** Petitioners have not demonstrated any violation of the SMA or
20 guidelines which require the City to utilize science in updating its SMP with respect to water
21 pollution from stormwater runoff and sewage overflows.⁶⁷
22
23
24
25

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27 ⁶⁴ City Council Meeting, July 14, 2014. John Anderson stated the city has begun replacement of the deficient
sewer pipes in Eagle Harbor. Ex. 2012.

28 ⁶⁵ The Response to Public Comments matrix contains a number of comments asserting the primary
29 contributors to marine pollution along Bainbridge shorelines are stormwater runoff from city streets and leaky
30 sewer pipes. See, e.g., comment 1193 from K. Harrington and 1194 from K. Kraft, Ex. 1939, p. 183. The City
31 responded: "Runoff is regulated through the NPDES, one of many other programs that directly or indirectly
32 influence the health of the Sound." *Id.*, p. 183.

⁶⁶ The SMP Water Quality and Stormwater management section is Section 4.1.6, p. 109-13, which includes
measures addressing pesticides, surface runoff, low impact development, and secondary containment for bulk
storage of oil and hazardous materials.

⁶⁷ If indeed the City has neglected sewer system maintenance or fails to comply with its NPDES permits, the
remedies are not in the Board's jurisdiction.

1 **C. Buffer widths set by city policy, not science-based information.**

2 PRSM objects that the City buffer width determinations were policy driven, not
3 science driven. Indisputably, the Bainbridge Island buffer widths were driven by a city policy
4 to minimize increase in the number of properties that might become nonconforming. The
5 City states:

6 [T]he buffers chosen reflected scientific information regarding the importance
7 of maintaining and protecting marine riparian areas, balanced with
8 consideration of existing priority uses, e.g., existing residential development
9 in proximity to the shoreline, and the goals and aspirations of the community
10 to limit the number of non-conforming structures.⁶⁸

11 Prior to this update of the SMP, 35% of the shoreline properties were already non-
12 conforming, usually in relation to size of the lot or placement of the structure on the lot.⁶⁹
13 Oceanographer, work group member and shoreline homeowner Marcia Lagerloef
14 commented to Ecology that the small size of the Zone 1 vegetative buffer, at 30 feet, “was a
15 compromise, on the low end of the spectrum, *to meet a policy goal of minimizing*
16 *nonconforming structures*, rather than based strictly on what would offer adequate
17 protection to the shoreline environment and all the ecological functions.”⁷⁰ The August 11,
18 2011 Herrera memorandum, Appendix C, SMP p. 322, states its buffer width
19 “recommendations are informed by the *City’s desire to limit the number of non-conforming*
20 *structures* therefore, existing distances to residential structure from the shoreline are
21 considered.”⁷¹

22 If the buffer width decision were to be driven solely by science, the buffers could be
23 much greater.⁷² PRSM cites Herrera: “... there was science to support buffers from as little
24 as 16 feet to as large as 1969 feet.” PRSM Brief, at 20. Indeed, there is credible evidence in
25 the record that science would not support a vegetative buffer of less than 50 feet, the
26
27
28

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30 ⁶⁸ City Brief at 18, citing Herrera Memorandum, SMP Appendix C, at 325, 328.

31 ⁶⁹ Ex. E-33-224, Letter from Planning Commissioner Maradel Gale to DOE, August 21, 2013.

32 ⁷⁰ Ex. E-33-243, August 21, 2013 letter from Marcia Lagerloef to Barbara Nightingale, DOE.

⁷¹ The accompanying Table 1 notes: The suggested minimum and maximum buffers are based on existing
distances to residential structures from the shoreline in addition to science-based recommendations for
shoreline and nearshore protection. SMP, p. 328.

⁷² Ex. 989, Herrera (2011), p. 2.

1 minimum required in the Native Vegetative Zones of the 1996 SMP for residential
2 designations.⁷³ In a June 27, 2012 memo to the City Council, Dave Sale, the ETAC Chair
3 advised:⁷⁴

4 The proposed [30 foot] buffers are unlikely to provide full protection for all
5 ecological functions. The larger buffers that have been established for natural
6 and conservancy designations [minimum 50 feet zone 1 vegetative zone for
7 Natural and 100 foot zone 1 for Island Conservancy] are within the range of
8 literature-based values for providing moderate level of effectiveness for some
9 key functions. The smaller primary buffer (zone 1) established for residential
10 and urban designations [30 feet] is below the range of values recommended
11 in the scientific literature for protection of key functions.

12 Given the strong opposition of PRSM and the Realtors to nonconforming status, their
13 objection to the City's incorporation of this policy consideration in its buffer width
14 determination appears disingenuous. In *Lake Burien Neighborhood v. City of Burien*,⁷⁵ the
15 Board recognized: "The SMA process does incorporate the use of scientific information, but
16 it does so as part of the balancing of a range of considerations, such as public access,
17 priority uses, and the development goals and aspirations of the community." Clearly, where
18 a jurisdiction is confronted by scientific recommendations consisting of ranges, buffer widths
19 are ultimately a policy decision. But the SMP decision requires weighing of interests while
20 assuring no net loss.
21

22 The City chose, here, to minimize the number of nonconforming structures.⁷⁶ **The**
23 **Board finds** the City's incorporation of policy as well as science into its buffer width
24 determination does not *per se* violate the SMA or the guidelines.⁷⁷

25 **The Board finds** Petitioners have failed to meet their burden of proof on this issue.
26
27

28 ⁷³ See Attachment A.

29 ⁷⁴ Cited at E-33-243, August 21, 2013 letter from Marcia Lagerloef to Barbara Nightingale, DOE .

30 ⁷⁵ GMHB Case No. 13-3-0013, Final Decision and Order (June 16, 2014) at 6.

31 ⁷⁶ In presenting the buffer proposal to City Council in August 2011, City planner Erickson was pleased to tell
32 City Council the new buffers would only increase nonconformity by about 15% and would meet the no net loss
standard. Ex. 2116, p. 7.

⁷⁷ There is no challenge before the Board concerning whether the Bainbridge Island buffers are in fact large
enough to ensure no net loss of ecological functions. Nothing in this decision should be read to imply such a
conclusion.

1 **D. Conflicting conclusions drawn from scientific information.**

2 Petitioners claim there are inconsistent provisions within the SMP which are not
3 supported by science. PRSM Brief, at 21. The PRSM brief highlights one supposed
4 contradiction:

5 For instance, the SMP has regulations which restrict the use of floats on the
6 basis that shadows on the water are bad for fish. SMP §§ 6.3.7.1.2;
7 6.3.7.1.3. At the same time, in numerous places the SMP requires planting
8 of trees along the shoreline to promote a canopy cover and retention of
9 existing trees because shade is good. The science does not support any
10 reason for concluding that shade in the water from docks, piers or floats is
bad while shade from trees is good.

11 The Board notes the ecological functions protected by the two sets of regulations
12 differ. Overhanging trees on the back beach serve to moderate temperature and humidity,
13 which may protect forage fish spawning areas. Addendum, p. 22-23;⁷⁸ Ex. 938, ETAC,
14 Riparian Zones and Buffers, p.3. A lack of shade on surf smelt spawning beaches results in
15 dessication and increased egg mortality. Addendum, p. 59, 74.⁷⁹ A forage fish occurrence
16 map provided in Battelle's 2003 Bainbridge Island Nearshore Assessment mapped herring
17 spawning across the northern shoreline of the Island as well as surf smelt and sand lance
18 spawning in the same area. Addendum p. 21, 74-75. The Addendum notes beach seine
19 surveys undertaken by the Bainbridge Island Shoreline Stewardship Program (BISSP),
20 when published, will provide additional information on forage fish distribution.⁸⁰ The

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23
24 ⁷⁸ "For summer spawning fish, the presence of overhanging trees along the upper beach area is important for
25 moderating wind and sun exposure, which can kill eggs (Rice 2006). The low marine riparian vegetation cover
26 along Bainbridge Island shorelines (27 percent) indicates that this may be a limiting factor for forage fish
27 success. Protection of the marine riparian forest along the backshore of beaches is important (EnviroVision
28 2007) because it cools the habitat along the upper intertidal beach, which is used by summer spawning
29 population of surf smelt and other forage fish (Pentilla 2004, Rice 2006)." See also Addendum, p. 59, 74.

30 ⁷⁹ Citing Pentilla, D.E., *Effects of Shading Upland Vegetation on Egg Survival for Summer Spawning Smelt on*
31 *Upper Intertidal Beaches in Puget Sound*. WDFW, Marine Resources Division, 2001; Rice, C.A., *Effects of*
32 *Shoreline Modifications on a Northern Puget Sound Beach: Microclimate and Embryo Mortality in Surf Smelt*.
Estuaries and Coasts 29(1):63-71, 2006; Pentilla, D.E., *Marine Forage Fishes in Puget Sound*, Puget Sound
Nearshore Partnership Report No. 2007-03. Seattle District, U.S. Army Corps of Engineers, 2007;
EnviroVision, Herrera, and AHG, *Protecting Nearshore Habitat and Functions in Puget Sound, an Interim*
Guide. Puget Sound Partnership, revised 2010.

⁸⁰ Dr. Flora observes there is only one summer smelt spawning beach on Bainbridge, and that is on a beach in
Eagle Harbor which has been treeless for decades Ex.189, Flora, October 2013, p. 4; Ex. 190, Flora July 2,
2012, p. 2-3; Ex. 195, Flora, April 2010, p. 5.

1 Addendum acknowledges overhanging trees have little effect on marine water temperatures
2 and so play a different role in the life cycle of anadromous fish than trees overhanging
3 mountain streams. Addendum, p. 59.

4 In contrast to the dappled shade of trees is the deep shade cast in the water by a
5 solid overwater structure.⁸¹ Eelgrass in particular requires light penetration into the water
6 column, and the Addendum reports “Eelgrass loss, in general, is widely attributed to
7 shading and disturbance . . . associated with shoreline development such as overwater
8 structure (docks and moorages). . . .” Addendum, p. 16.⁸² The SMP pier regulations note:
9 “Piers create shadow that can impact the viability of marine vegetation that require sunlight
10 to grow.” SMP p. 207, §6.3.7.2.

11
12 The extent to which the deep shade of overwater structures may increase predation
13 threats to juvenile fish is a second concern. The SMP float regulations, for example, explain
14 the impact of “sharp shadows” cast by floats.

15
16 In the case of rockfish, they give birth to live larval young that spend several
17 months being passively dispersed by tidal fluctuations, as they mature they
18 move out to deeper water but initially are at high risk of predation. Manmade
19 shade creates artificial pocket of opportunity for the predators of young fish,
20 and unlike the shade from overhanging vegetation, the negative impacts
outweigh the benefits.

21 SMP p. 207, §6.3.7.3. The SMP policies for over-water structures, SMP § 6.3.3.3.c, state
22 design considerations should: (ii) Provide functional grating for light penetration; and (iii)
23 Configure pier and float orientation to minimize shading. SMP at 203.

24 In sum, the SMP policies, applying current, marine-based science, have not created
25 incompatible or inconsistent regulations concerning shade, but properly distinguish the
26 ecological functions to be protected in the nearshore and intertidal areas from the ecological
27 functions to be protected in the upper-tidal and back beach area.

31 ⁸¹ This was pointed out by counsel for Ecology in oral argument at the hearing on the merits.

32 ⁸² Citing Mumford, T.F., *Kelp and Eelgrass in Puget Sound*, Puget Sound Nearshore Partnership Report No.
2007-05. Seattle District, U.S. Army Corps of Engineers, 2007; Fresh, K., C, Simonstad, J. Brennan, et al.,
Guidance for Protection and Restoration of the Nearshore Ecosystems of Puget Sound. Puget Sound
Nearshore Partnership Report No. 2004-02. Washington Sea Grant Program, University of Washington, 2004.

1 The “shade is good/shade is bad” conundrum posed by petitioners is not, after all, a
2 confusing application of unsupported science. Rather, the City has applied current, local,
3 marine-based scientific surveys and studies to inform its SMP policies and regulations. **The**
4 **Board finds** Petitioners have failed to meet their burden on this issue.

6 **E. Reasoned, objective evaluation of the relative merits of conflicting data.**

7 PRSM contends the City failed to address the limitations of the scientific information
8 on which it relied (PRSM Brief, at 20) and, in particular, failed to consider the input of Dr.
9 Don Flora. Neither assertion is well taken.

11 ETAC provided the Planning Commission and City Council a memo laying out “Data
12 Gaps and Uncertainties” in the science concerning marine riparian areas. Ex. 938,
13 Technical Framework: Riparian Protection Zones and Buffers, August 4, 2011. The
14 ecological functions of marine riparian vegetation were identified as water quality, fish and
15 wildlife habitat, control of erosion and sediment supply, shading and microclimate
16 moderation, food source, and LWD functions. For each of these functions, ETAC
17 summarized what is known and also the data gaps and uncertainties.⁸³ ETAC cites a 2009
18 report by Brennan, et al., acknowledging scientific uncertainties concerning management of
19 marine riparian vegetation and the effect of buffer widths on marine riparian and aquatic
20 systems.⁸⁴ The Herrera Addendum is also replete with acknowledgement of the limitations
21 of the existing research.⁸⁵

23 WAC 173-26-201(2)(a) indicates local governments should be prepared to indicate
24 “(ii) assumptions made concerning, and data gaps in, the scientific information.” This the
25 City has certainly done.

27 ⁸³ E.g., “We need a better understanding of the functional differences between native and non-native
28 vegetation (i.e., does replanting of native vegetation in buffers, with or without removal of non-native
29 vegetation, make a difference in the functions the buffer was meant to protect).” Ex. 938, p. 3.

30 ⁸⁴ Brennan, J., H. Culverwell, R. Gregg, P. Granger. *Protection of Marine Riparian Functions in Puget Sound*,
Washington Sea Grant, for WDFW, 2009.

31 ⁸⁵ For example, Addendum, Ex. 506, p. 71: Existing literature on buffer effectiveness based on percentage of
32 pollutant removal does not indicate whether the reduction complies with water quality standards or protects
particular biological resources; pp. 73, 75: In marine areas, site specific factors are of more importance than in
freshwater areas; empirical studies of marine buffer effectiveness are needed to tease out these relationships;
p. 76: Because most buffer recommendations have been developed for riverine systems, effects of wind, salt
spray, dessication and other microclimate factors in the marine environment need to be understood.

1 Dr. Flora's papers critique the science relied on by the City and question the scientific
2 basis for the SMP's restrictions on single-family property management on Bainbridge
3 shorelines. Petitioners fault the City for not providing a "reasoned, objective evaluation of
4 the relative merits of the conflicting data" offered by Dr. Flora.

5 At the hearing on the merits, counsel for the City explained the Herrera Addendum
6 was the city's evaluation and response to the positions advanced by Dr. Flora.⁸⁶ Similarly,
7 ETAC's work addressed the Flora assertions about data gaps and uncertainties, though not
8 naming him personally.⁸⁷

9
10 Having assembled current scientific data and assessed its uncertainties, the City
11 appropriately chose to rely on its consultants and resident advisory committee in devising a
12 shoreline master program that would comply with Ecology guidelines. The guidelines require
13 shoreline vegetation conservation. WAC 173-26-221(5)(b): "Master programs *shall include*
14 . . . regulatory provisions that address conservation of vegetation." "In establishing
15 vegetation conservation regulations, local governments *must use* available scientific and
16 technical information. . . ." *Id.* "Current scientific evidence indicates that the length, width,
17 and species composition of a shoreline vegetation community contribute substantively to the
18 aquatic ecological functions. . . . Riparian corridors along marine shorelines provide many of
19 the same functions as their freshwater counterparts." *Id.* (emphasis added). Similarly, the
20 guidelines require regulation of shoreline stabilization structures and docks and overwater
21 structures.⁸⁸

22
23 The SMA and Ecology's guidelines do not require local governments to referee
24 disputes in the scientific community. Here the City gave reasoned consideration to Dr.
25 Flora's critique by documenting the gaps and uncertainties in applicable science, which is
26 the Flora theme, while building its SMP provisions around the consensus science
27 incorporated in the requirements of the guidelines.
28
29
30

31 ⁸⁶ The Board will not second-guess the City's choice not to critique Flora by name.

32 ⁸⁷ Ex. 938, Technical Framework: Riparian Protection Zones and Buffers, August 4, 2011, (data gaps and uncertainties).

⁸⁸ See citations and analysis at Legal Issues IV-2, Piers, Dock and Floats, IV-3 Shoreline Stabilization, IV-4, Floating Homes, and IV-5, Mooring Buoys, *infra*.

1 Finally, Petitioners complain that when citizens made comments about the limitations
2 of science, the City's boiler plate response was:

3 The City is utilizing current science to update the Shoreline Master Program,
4 including two science summaries produced by consultants for the City (the
5 Science Addendum from Herrera, 2011 and the Science Review from Battelle,
6 2003). ETAC and the consultants are working diligently to ensure that the
7 policies are based on the best scientific data that is currently available and
relevant to Bainbridge Island.

8
9 Ex. 1939. According to PRSM, the City used the same language 27 times in the Planning
10 Commission's Response to Public Comments, with a variation of that same response in
11 another nineteen. *Id.*

12 Specific examples of the public comments receiving that response include:

13 There is absolutely no science that demonstrates that overwater structures
14 caused a net loss of ecological function. Ex. 1939, no. 176.

15 Please show studies applicable to Puget Sound in general and Bainbridge
16 Island in particular that native vegetation is any way superior to non-native
17 vegetation carefully chosen for desired ecological functions. Ex. 1939, no.
18 81.

19 The use of non-applicable science to justify pre-determined positions is
20 unconscionable. Speculation is not science and should not be used as a
21 basis for "taking" private property rights. Ex. 1939, no. 150.

22
23 It would be impractical to respond with specificity to general criticisms of science, or the lack
24 of same. Reference in the City's responses to the Herrera and Battelle science summaries
25 and the City's ongoing consideration appears to the Board to be a practical, realistic
26 approach. The Board notes the City responded in more detail to specific comments about
27 the need for vegetative buffers, for example, or for bulkhead regulation, frequently providing
28 the language from the applicable guidelines.⁸⁹ These responses were also repeated many
29 times. PRSM's objection to the City's response is without merit.
30

31
32 ⁸⁹ See e.g., Ex. 1939, no. 180, B. Peters comment about bulkheads, with response setting out WAC 173-26-
231 outline of the impacts of shoreline hardening; no. 470, J. Grundman comment about vegetation, with
response setting out WAC 173-26-210 requirements for protecting riparian vegetation.

1 In sum, the City assembled current science, indicated data gaps and uncertainties,
2 and provided objective, reasonable consideration of opposing views. **The Board finds**
3 Petitioners have failed to carry their burden of demonstrating a violation of RCW
4 90.58.100(1) or WAC 173-26-201(2)(a).
5

6 **Conclusion for Legal Issue I**

7 The burden of proof required to be met by PRSM is to show (a) by clear and
8 convincing evidence that the provisions as they relate to shorelines of statewide significance
9 are inconsistent with the policy of RCW 90.58.020 and the applicable guidelines; or (b) the
10 provisions as they relate to shorelines are clearly erroneous in view of the entire record.
11

12 **The Board finds and concludes** PRSM has failed to meet either burden of proof to
13 establish violations of RCW 90.58.130, RCW 90.58.100(1), or violations of WAC 173-26-
14 090, 173-26-100, 173-26-201(2)(a) and (3)(b)(i) in regards to the City's process of
15 developing and adopting the SMP, including notice, public participation, and assembling
16 and utilizing scientific and technical information.
17

18 **Legal Issue II – General Provisions and Shoreline Designations**

19 **I-2. Whether the City failed to address each of the elements required in RCW** 20 **90.58.100 and WAC 173-26-191(2)(a)(ii).⁹⁰ PFR 23**

21 **Applicable Law**

22 **RCW 90.58.100(2)** provides:

23 (2) The master programs shall include, when appropriate, the following:

24 (a) An economic development element for the location and design of
25 industries, projects of statewide significance, transportation facilities, port
26 facilities, tourist facilities, commerce and other developments that are
27 particularly dependent on their location on or use of the shorelines of the
28 state;
29

30 ⁹⁰WAC 173-26-191(2)(a)(ii) is not relevant to this particular issue but is addressed by PRSM in other sections
31 of its argument. WAC 173-26-191(2)(a)(ii) says SMP regulations shall:

- 32
- Be sufficient in scope and scale for implementation
 - Contain environment designation regulations consistent with WAC
 - Contain general regulations, use regulations, and shoreline modification regulations
 - Be consistent with constitutional and legal limits on regulation of private property.

1 . . .

2 (e) A use element which considers the proposed general distribution and
3 general location and extent of the use on shorelines and adjacent land areas
4 for housing, business, industry, transportation, agriculture, natural resources,
5 recreation, education, public buildings and grounds, and other categories of
6 public and private uses of the land;

7 The SMP Guidelines state that the Master Program elements need not be separate
8 sections of the SMP. **WAC 173-26-191(1)(b)** provides:

9 The Growth Management Act (chapter 36.70A RCW) also uses the word
10 “element” for discrete components of a comprehensive plan. To avoid
11 confusion, “master program element” refers to the definition in the Shoreline
12 Management Act as cited above. Local jurisdictions are not required to address
13 the master program elements listed in the Shoreline Management Act as
14 discrete sections. The elements may be addressed throughout master program
15 provisions rather than used as a means to organize the master program.

16 Discussion and Analysis

17 PRSM’s argument here is that WAC 173-26-191(1)(b), which says the “elements” do
18 not have to be discrete sections of the SMP, is inconsistent with RCW 90.58.100(2)(a) and
19 should be disregarded by the Board. PRSM Brief at 16-18. The Board is urged to find the
20 SMP inconsistent with the statutory requirement for certain “elements.”

21 Ecology counters: “To the extent PRSM’s argument is that every single element
22 suggested in RCW 90.58.100 must be addressed in a discrete manner in an SMP, the plain
23 language of the statute refutes that contention. Only elements appropriate for the
24 jurisdiction need be included to the extent feasible.” Ecology Brief, at 14.

25 The Board notes RCW 90.58.100(2) requires that a master program shall include,
26 “*when appropriate*,” elements addressing economic development, public access,
27 recreation, circulation, use, conservation, historic, cultural, scientific and education, flood
28 damage, and “[a]ny other element *deemed appropriate or necessary*” by the jurisdiction to
29 effectuate the policy of RCW 90.58. RCW 90.58.100(2). The Court of Appeals has recently
30 stressed that the words “where appropriate” signal the legislature’s intent to allow discretion
31 in the planning process. *Concrete Nor’West v. Western Washington Growth Management*
32 *Hearings Board*, Div. II No. 45563-3-II (Feb. 3, 2015), Slip Op. at 14.

1 WAC 173-26-191(1)(b) states:

2 Local jurisdictions are not required to address the master program elements
3 listed in the [SMA] as discrete sections. The elements may be addressed
4 throughout master program provisions rather than used as a means to
5 organize the master program.

6 PRSM argues that this WAC is invalid and urges the Board to disregard it.

7 Petitioners contend that even if WAC 173-26-191(1)(b) controls, and the “elements”
8 can be addressed in various parts of the SMP, the City has failed to address some of the
9 required elements, including agriculture, housing and industries, and has failed to provide
10 an economic development element.

11 The Board finds the SMP contains discrete sections on agriculture, SMP § 5.1,
12 residential development, SMP § 5.9, commercial development, SMP § 5.4, and industrial
13 development, SMP § 5.6. As for agriculture, it is a prohibited use in all shoreline
14 designations, except that gardening for personal consumption or for the maintenance of
15 household pets is considered accessory to residential uses. SMP at 39, Table 4-1; SMP at
16 152, § 5.1. PRSM doesn’t indicate why agriculture should be considered an appropriate
17 element of Bainbridge shoreline use. Housing may be located in some shoreline
18 designations and not in others, and is subject to specific regulations that control its location,
19 design, and extent. SMP at 41, Table 4-1, SMP at 61, Table 4-2, and SMP at 181-87, §5.9.

20 Under RCW 90.58.100(a), an economic development element addresses “the
21 location and design of industries, projects of statewide significance, transportation facilities,
22 port facilities, tourist facilities, commerce and other developments that are particularly
23 dependent on their location on or use of the shorelines.” Bainbridge’s state ferry terminal
24 and other water-dependent industry and facilities are located in Eagle Harbor and allowed in
25 the Urban designation section of the SMP. SMP at 23-24, § 3.2.1 . Water-dependent
26 industrial uses may be located outright in the Urban designation, and water-related
27 industrial uses may be located in the Urban designation with a conditional use permit. SMP
28 at 40, Table 4-1. Industrial uses are further controlled by bulk and location requirements.
29 SMP at 56-57, Table 4-2; SMP at 169-74, § 5.6. PRSM has not suggested other water-
30
31
32

1 dependent industrial/commercial developments that merit analysis for location in other
2 shoreline designations.

3 It appears to the Board that RCW 90.58.100's provisions for economic development
4 are implemented through WAC 173-26-201(2)(d)(ii)'s requirement for reservation of harbor
5 areas and other areas where commercial navigational access and support facilities allow
6 water-dependent and water-related industry and commerce.⁹¹ The Urban shoreline in Eagle
7 Harbor meets this requirement. As Ecology points out: "The reality is that City's shoreline
8 has approximately 53 miles of waterfront that is 93% developed, with 75% of that
9 development being residential use. SMP at 14 § 1.3.1; E-010 at 7. When the City's highly
10 developed shoreline is considered, a specific economic element for the siting of industry
11 and business in shoreline jurisdiction appears unnecessary to this specific SMP." Ecology
12 Brief, at 15.

13
14 **The Board finds** that the SMP addresses the design, distribution, location, and
15 extent of agriculture, housing, and industry through what uses are permitted or prohibited in
16 each shoreline environment, as well as through the applicable regulations. The Board finds
17 the SMP addresses accommodation of the water-dependent and water-related industrial
18 uses required for an "economic development element" in the provisions for its Urban
19 environment. PRSM fails to meet its burden of proof on this issue.
20
21

22 **II-1. Whether the City is not in compliance with RCW 90.58.020 in applying**
23 **the policies for shorelines of statewide significance to those portions of**
24 **the City's shoreline areas which are not shorelines of statewide**
25 **significance. See, e.g., SMP 6.3.1. PFR 27.**

26 Discussion and Analysis

27 PRSM contends the SMP fails to differentiate shorelines from SSWS and appears to
28 treat all shorelines as if they were shorelines of statewide significance. PRSM Brief pp. 26-
29 27. The language PRSM points to is in SMP §6.3.1, the "Applicability" section of Section
30 6.3 Overwater Structures, which provides that all overwater structures will be reviewed
31

32 ⁹¹ WAC 173-26-201(2)(d)(ii): "... Harbor areas ... and other areas that have reasonable commercial
navigational accessibility and necessary support facilities such as transportation and utilities should be
reserved for water dependent and water related uses that are associated with commercial navigation. . . ."

1 under other provisions of the SMP, “when applicable.”⁹² The other SMP provisions listed
2 include “Section 4.4.1 Shorelines of Statewide Significance.” PRSM contends this means all
3 docks, over-water residences and the like are reviewed under the policies for shorelines of
4 statewide significance, regardless of whether they extend beyond extreme low tide.
5 Additionally, PRSM points out SMP §6.3.1 references Section 4.4.1, but there is no Section
6 4.4.1. PRSM Brief, at 27.
7

8 The City responds that SMP § 6.3.1 is an “applicability” section, which simply
9 indicates that there are other sections of the SMP that *may* apply. City Brief at 18-19. The
10 overwater structures provisions cross-reference the SMP’s section on shorelines of
11 statewide significance because it is obvious that some overwater structures will, indeed, be
12 located on such shorelines.
13

14 The Board notes the SMP section of Shorelines of Statewide Significance, which is
15 actually § 4.1.1, begins with an “applicability” section, SMP § 4.1.1.2, stating that SSWS
16 provisions only apply to “areas lying waterward from the line of extreme low tide” and that
17 only “[p]roposed development, use, or activity within shorelines of statewide significance
18 shall be reviewed in accordance with preferred policies listed in § 4.1.1.3.” SMP at 67. This
19 simply means that where an overwater use lies waterward from the line of extreme low tide,
20 the SSWS policies apply. This is consistent with Ecology’s reading of the SMA provisions.⁹³
21

22 **The Board finds** Petitioners fail to demonstrate the SMP applies SSWS policies to
23 areas that are not SSWS in violation of RCW 90.58.020.
24

25 **II-2. Whether the City is not in compliance with RCW 90.58.090(4), RCW**
26 **36.70A.170, RCW 36.70A.050⁹⁴ and WAC 173-26-221(2) in prohibiting all**
27 **development in critical areas (SMP 5.9.3.6) while describing the entire**
28 **island as a critical area. SMP App B-7, at p. 276. PFR 28**

29 ⁹² “Overwater structure activities will be reviewed under the “no net loss” provisions of Section 4.1.2.,
30 Environmental Impacts and Section 4.0 General (Island-wide) Policies and Regulations; Section 4.4.1 [sic]
31 Shorelines of Statewide Significance, and may also be reviewed under Section 4.1.5, Critical Areas; Section
32 4.1.6, Water Quality and Stormwater Management, and Appendix B, *when applicable*.” SMP, p. 202.
(emphasis added).

⁹³ Ecology Brief at 15-16. Ecology specifically found that the Bainbridge SMP provisions relating to SSWS
provide for the optimum implementation of SMA policies. E-010 at 31.

⁹⁴ Neither PRSM nor Realtors make any reference to RCW 36.70A.170 or RCW 36.70A.050 in their opening
briefs. These issues are dismissed as **abandoned**.

1 **Discussion and Analysis**

2 Both PRSM and the Realtors claim that the SMP declares all of Bainbridge Island a
3 critical area, and then prohibits new development and uses anywhere on the island. PRSM
4 Brief at 27; Realtors Brief, at 6-9. These parties cite to SMP §5.9.3.6:

5 Prohibit new residential development and accessory uses from locating in
6 critical areas including critical saltwater habitat, wetlands, steep or unstable
7 slopes, floodways, migratory routes and marine vegetation areas.

8 The SMP Appendix B incorporates relevant portions of the City's Critical Areas
9 Ordinance (CAO) into the SMP. Appendix B defines critical areas:

10 "Critical areas" means aquifer recharge areas, fish and wildlife habitat
11 conservation areas, frequently flooded areas, geologically hazardous areas,
12 and wetlands.

13 SMP at 264. PRSM and Realtors point to SMP Appendix B at 279: "The entirety of
14 Bainbridge Island is the recharge area for the island aquifers." They also point to Fish and
15 Wildlife Habitat Conservation Areas as including "marine and estuarine waters of the state."
16 SMP p. 283, B-8.B.1.a. Petitioners and Intervenor assert the SMP prohibition of residential
17 development in critical areas, such as aquifer recharge areas and fish and wildlife habitat,
18 conflicts with RCW 90.58.090(4) and WAC 173-26-221(2), which authorize new residential
19 development and docks, piers and floats.

20 The City responds that (1) the express wording of SMP §5.9.3.6 indicates that it only
21 applies to specific critical areas that do not include critical aquifer recharge areas or all fish
22 and wildlife habitat areas; (2) the other policies set forth in SMP § 5.9.3: §§ 5.9.3.1, 5.9.3.2,
23 5.9.3.8, 5.9.3.9, 5.9.3.10, and 5.9.3.11 all indicate that the intent is to allow new residential
24 development within shoreline areas; and (3) SMP § 5.9.3.6 is a policy and thus "do[es] not
25 impose requirements beyond those set forth in the regulations." SMP at 1, §1.1. The
26 provision is not a blanket prohibition on new residential development on Bainbridge Island,
27 according to the City. City Brief at 19.

28 Ecology agrees the SMP does not prohibit all residential development in critical
29 areas. Ecology Brief at 18-19. Ecology reads SMP § 5.9.3.6 as prohibiting new residential
30 development in "certain, specified critical areas (critical saltwater habitat, wetlands, steep
31
32

1 or unstable slopes, floodways, migratory routes and marine vegetation areas).” Ecology
2 contends this policy prohibition reflects a reasonable approach to avoid new residential
3 development in precarious locations. This is particularly reasonable, in Ecology’s view,
4 given that any residential development must be consistent with no net loss of ecological
5 function, and the specified critical areas are highly ecologically sensitive.

6
7 In the Board’s view, the challenged SMP policy §5.9.3.6 is, at best, infelicitously
8 worded. PRSM and Realtors read “including” to mean “including, but not limited to,” while
9 Ecology and the City read “including” to mean “including only” or “including the following.”
10 The Board finds the respondents’ construction to be more reasonable in the context of the
11 remainder of SMP Section 5.9.3 which generally allows new residential development and
12 appurtenances within the shoreline designation. Under the PRSM and Realtor’s
13 construction, the rest of Section 5.9.3 might as well be written out of the ordinance.

14
15 Further, the critical areas specified in the policy each address ecological functions of
16 specific importance in the Bainbridge shoreline.

- 17 • Critical saltwater habitat is defined in WAC 173-27-221(2)(c)(iii) as including kelp
18 beds, eelgrass beds, spawning and holding areas for forage fish, such as
19 herring, smelt and sandlance; shellfish beds, mudflats, intertidal habitat with
20 vascular plants, and areas with which priority species have a primary
21 association. Thus marine vegetation areas and salmon migratory routes are
22 incorporated.
- 23 • Wetlands are required to be protected under WAC 173-27-221(2)(c)(i).
- 24 • Steep or unstable slopes characterize a significant portion of Bainbridge
25 shoreline. The Guidelines “do not allow” development that would cause
26 foreseeable risks to people or property and “do not allow” new development that
27 would require structural shoreline stabilization over the life of the development.
28 WAC 173-27-221(2)(c)(ii)(B) and(C).
- 29 • Finally, sections of the Bainbridge shoreline that are susceptible to storm surge
30 and frequently overtopped with waves may be characterized as frequently
31 flooded areas. The tip area of Point Monroe, for example, is regularly overtopped
32

1 during extreme high tides.⁹⁵ WAC 173-27-221(3)(c)(1) states new development
2 in shoreline jurisdiction should not be established when it would be reasonably
3 foreseeable that the development would require structural shoreline stabilization.
4 Prohibition of new residential development in these specified critical areas is consistent
5 with the guidelines.

6 The Board concludes the Respondents' construction of SMP §5.9.3.6 is reasonable,
7 in light of the SMP context and the requirements of the guidelines. Petitioners' allegation
8 that it creates a "blanket designation" of the whole shoreline as critical area where all
9 residential development is prohibited is not persuasive. Based on the actual development
10 regulations, there is clearly no blanket prohibition.

11 **The Board finds** Petitioners have failed to carry their burden of proving SMP
12 §5.9.3.6 is clearly erroneous.⁹⁶

13
14
15 **II-3. Whether the City violated RCW 90.58.080, RCW 90.58.030(3)(b), WAC 173-**
16 **26-110 and WAC 173-26-191 in its shoreline designation process and in**
17 **its Residential Conservancy and Priority Aquatic designations. PFR 53,**
18 **54 (a-c).**

19 **Applicable Law**

20 **WAC 173-26-191(1)(d)** provides the framework for shoreline environmental
21 designations:

22 (d) **Shoreline environment designations.** Shoreline management must
23 address a wide range of physical conditions and development settings along
24 shoreline areas. Effective shoreline management requires that the shoreline
25 master program prescribe different sets of environmental protection
26 measures, allowable use provisions, and development standards for each of
27 these shoreline segments.

28 The method for local government to account for different shoreline conditions
29 is to assign an environment designation to each distinct shoreline section in
30 its jurisdiction. The environment designation assignments provide the
31 framework for implementing shoreline policies and regulatory measures

32 ⁹⁵ Ex.1616. Herrera, Spit Science Summary – Point Monroe, August 24, 2012, at 17-18, discussing FEMA requirements for properties in flood zones.

⁹⁶ It would be helpful if the sentence could be clarified in codification or through a limited amendment.

specific to the environment designation. WAC 173-26-211 presents guidelines for environment designations in greater detail.

WAC 173-26-211(2)(a) requires:

(a) Master programs shall contain a system to classify shoreline areas into specific environment designations. This classification system shall be *based on the existing use pattern, the biological and physical character of the shoreline, and the goals and aspirations of the community as expressed through comprehensive plans* as well as the criteria in this section. Each master program's classification system shall be consistent with that described in WAC 173-26-211 (4) and (5) unless the alternative proposed provides equal or better implementation of the act. (emphasis added)

WAC 173-26-211(4)(b) and (c) sets up a recommended classification system consisting of six basic environments: high-intensity, shoreline residential, urban conservancy, rural conservancy, natural, and aquatic. Local governments are instructed to assign all shoreline areas an environment designation consistent with the corresponding designation criteria provided in the guidelines for each environment. Alternative classification systems are allowed so long as the local government “assure(s) that existing shoreline ecological functions are protected with the proposed pattern and intensity of development.” WAC 173-26-211(4).

WAC 173-26-110 sets out the requirements for a local jurisdiction’s submittal of its master program to Ecology for review.⁹⁷ **WAC 173-26-110(3)** calls for submittal of environmental designation maps, stating designation is to be based on “*existing development patterns, the biophysical capabilities and limitations of the shoreline being considered, and the goals and aspirations of the local citizenry* as reflected in the locally adopted comprehensive land use plan.” (emphasis added)

⁹⁷ The guidelines which are applicable to the Board’s review of master programs are those set forth in Part III, entitled *Guidelines* at WAC 173-26-171 through and including WAC 173-26-251. However, WAC 173-26-201(1)(a) incorporates “the minimum procedural rule requirements of WAC 173-26-010 through 173-26-160,” bringing WAC 173-26-110 arguably within the Board’s scope of review.

Statement of Facts – Shoreline Designations

The 1996 Bainbridge SMP set up six shoreline designations: Urban, Semi-Rural, Rural, Conservancy, Natural and Aquatic.⁹⁸ Bainbridge Island is somewhat unique in that the whole island incorporated in 1991, prior to enactment of the GMA. The SMP designations which it adopted a few years later used a “rural” classification for much of the shoreline, recognizing that the majority of privately-owned shoreline, though developed with single-family homes, is zoned and planned at rural rather than urban densities.⁹⁹ However, because these areas are within the incorporated municipality, “rural” is not an accurate classification. The updated SMP adopted a new set of six classifications: Urban, Shoreline Residential, Shoreline Residential Conservancy, Island Conservancy, Natural and Aquatic.¹⁰⁰

Seventy-five per cent of Bainbridge marine shoreline is designated for residential uses, with a split of 37% Shoreline Residential and 38% Shoreline Residential Conservancy. Ex. E-010, p. 14. Shoreline Residential designation is assigned to lands “presently zoned, platted or developed for residential uses.” SMP §3.2.2.2. Shoreline Residential Conservancy designation is assigned where heightened protections are needed in order to accommodate residential use while protecting shoreline ecological functions and processes. SMP §3.2.3.1. Single family residential is a permitted use in the Urban, Shoreline Residential, and Shoreline Residential Conservancy designations, a conditional use in Island Conservancy, and prohibited in the Natural Designation. SMP p. 41, Table 4.1.

Aquatic designation is assigned to all lands waterward of the ordinary high-water mark. WAC 176-23-211(5)(c). The Bainbridge SMP creates a Priority Aquatic designation applied to “aquatic areas of sensitive and unique ecological value.” SMP § 3.3.2.1. Type 1 Priority Aquatic covers embayments – barrier lagoons, barrier estuaries, and closed lagoons. SMP §3.3.2.1. Point Monroe Lagoon is a barrier lagoon and Fletcher Bay is a

⁹⁸ See e.g., SMP p. 333-334, for upland environments.

⁹⁹ The underlying zoning for Bainbridge Island’s Shoreline Residential and Shoreline Residential Conservancy environments is generally R-1, one home per acre, or R-2, two homes per acre. Densities of four or more dwelling units per acre are generally considered urban.

¹⁰⁰ This alternative to the classification system in the guidelines was accepted by Ecology in its approval of the Bainbridge SMP.

1 barrier estuary. SMP, p. 33. The designation criteria specify Priority Aquatic B is the
2 classification for priority aquatic areas located adjacent to upland areas with a high level of
3 existing development. SMP §3.3.2.2. PRSM describes both Point Monroe and Fletcher Bay
4 uplands as “fully developed.” PRSM Brief at 29. Herrera Environmental Consultants
5 provided the City with a Spit Science Summary, August 24, 2012, to determine the scientific
6 basis for SMP regulation of future development on Point Monroe. Ex.1616.
7

8 **Discussion and Analysis**

9

10 PRSM contends the City fails to comply with WAC 173-26-110 and WAC 173-26-191
11 because its shoreline designations are not based on existing development patterns,
12 biophysical capabilities of the land and aspirations of the local citizenry. PRSM Brief, pp. 29-
13 30. Objections from the PRSM petitioners during the City’s process focused on the
14 Shoreline Residential Conservancy and Priority Aquatic B designations. PRSM specifically
15 challenges the Shoreline Residential Conservancy designation for sections of the island
16 perimeter and for portions of the Eagle Harbor shoreline. PRSM also protests the Priority
17 Aquatic B designation for Point Monroe Lagoon and Fletcher Bay. Additionally, PRSM
18 objects that SMP §3.4.4 allows changing of a shoreline designation without a legislative
19 process, contrary to RCW 90.58.080.
20

21 Island Perimeter.

22

23 Petitioners argue that much of the perimeter of the Island is improperly designated
24 Shoreline Residential Conservancy. While Petitioners cite the purpose statement of the
25 Shoreline Residential Conservancy regulations in support of their argument, the City
26 stresses the actual designation criteria in SMP § 3.2.3.2.2, which allows areas to be
27 designated as Shoreline Residential Conservancy if they “retain important ecological
28 functions and processes, even though partially developed.” SMP at 26. Petitioners have
29 presented no evidence that specific perimeter areas designated Shoreline Residential
30 Conservancy do not qualify under the designation criteria.
31
32

1 The Shoreline Residential Conservancy purpose statement is modeled after the
2 Guidelines provisions for Urban Conservancy.¹⁰¹ SMP §3.2.3.1 states the purpose of the
3 designation is to accommodate compatible residential uses while protecting shoreline
4 ecological functions and processes for sensitive lands. SMP §3.2.3.2 establishes
5 designation criteria, including:

- 6 (2)(a) Areas subject to severe biophysical limitations such as:
7 i. Sediment sources for littoral cells (Feeder Bluffs).
8 ii. Flood-prone areas.
9 iii. Geo-hydraulic shoreforms (e.g., accretion beaches, barrier beaches, and
10 sand spits).
11 iv. Wetlands and estuaries.
12 v. Areas important to the maintenance of surface water level groundwater
13 flow, and water quality.
14 vi. Biodiversity maintenance.
15 (b) Areas that retain important ecological functions and processes, even
16 though partially developed.

17 The entire shoreline of Bainbridge Island was mapped by Battelle in 2004 and each
18 reach was individually scored against a set of controlling factors and ecological functions.¹⁰²
19 In 2010, Coastal Geologic Services, Inc. provided complete geomorphic mapping of the
20 island's 53 miles of marine shorelines, identifying each drift cell and sediment sources.¹⁰³
21 These studies provided Bainbridge with reach-by-reach documentation of the geomorphic
22 conditions of its shores and detailed identification of aquatic and terrestrial flora and fauna in
23 nearshore, intertidal, and supratidal zones around the island. The Shoreline Residential
24 Conservancy designation is not continuous around the perimeter of the island, so, without
25 specific evidence to the contrary, the Board must assume the City exercised judgment in
26 determining where the "severe biophysical limitations" or "important ecological functions and
27 processes" exist.
28

30 ¹⁰¹ Ecology explains Bainbridge's Shoreline Residential Conservancy designation is a version of WAC 173-26-
31 211(5)(e) Urban Conservancy. Ex. E-013, p. 18.

32 ¹⁰² Ex. 147. *Bainbridge Island Nearshore Habitat Characterization and Assessment, Management Strategy
Prioritization, and Monitoring Recommendations* (Battelle 2004).

¹⁰³ Ex. 117. *Bainbridge Island Current and Historic Coastal Geomorphic/Feeder Bluff Mapping* (Coastal
Geologic Services, Inc. 2010).

1 PRSM argues perimeter shorelines do not meet the City's designation criteria
2 because they are not "sensitive lands" but rather are already developed, so there is no basis
3 for larger buffers. Feeder bluffs, PRSM contends, may require greater setback from the top
4 of the bluff, but don't justify limiting use of property for gardening and family use, as larger
5 buffers do. PRSM Brief, at 30. This generalized objection is not sufficient to offset the
6 detailed scientific assessment of the coastline on which the SMP relies. The Board cannot
7 invalidate the City's designation of sensitive lands simply because they have already been
8 built upon. PRSM has brought forward no evidence that the City's designation of any
9 specific area of the Island perimeter violates the designation criteria of SMP §3.2.3.2. **The**
10 **Board finds** Petitioners have failed to meet their burden of proof.
11

12
13 Eagle Harbor.

14 Petitioners argue that residential land adjacent to Eagle Harbor was improperly
15 designated Shoreline Residential Conservancy because Eagle Harbor had low ecological
16 functions when studied by Battelle in 2004. PRSM Brief at 29, citing Ex. E-147, p 58-59.
17 But the City points to Battelle's recommendation for management action strategies in Eagle
18 Harbor: "[F]or reaches with low controlling-factor disturbance scores, the most appropriate
19 management action strategies would be to conserve, preserve, and restore (to pre-
20 disturbance or pre-historical conditions)." City Brief at 19-20, citing Ex. E-147, p. 59. Given
21 that "[t]he purpose of Shoreline Residential Conservancy is to accommodate compatible
22 residential uses while protecting, conserving, and restoring shoreline ecological functions,"
23 SMP at 25, § 3.2.3.1, the City says, its designation of residential lands along Eagle Harbor
24 is consistent with the Battelle study.
25
26

27 The Board notes the Eagle Harbor Management Zone assessed by Battelle
28 comprises two superfund sites, intensely developed state ferry facilities, the Winslow urban
29 area, marinas, as well as a forage fish spawning beach and several stretches of single-
30 family residential use. Battelle's generalized conclusions and recommendations about the
31 entire management zone are not particularly useful in determining whether specific sensitive
32 reaches remain and where they are located. The City has designated several areas along

1 Eagle Harbor's shores Shoreline Residential and other areas Shoreline Residential
2 Conservancy. Without specific information from Petitioners identifying the areas being
3 challenged, the Board is unable to correlate the designations with either Battelle's reach-by-
4 reach scoring, Ex. E-147, or Coastal Geologic Services' drift cell data, Ex. 117. The Board
5 must defer to the City's application of the SMP designation criteria. Petitioners have not met
6 their burden of proof.
7

8 Point Monroe Lagoon and Fletcher Bay.
9

10 Point Monroe is a spit at the northeast end of the Island, approximately 2/3 mile long
11 and enclosing a lagoon. Residences are built on both sides of a central road, many of the
12 residences partially over water. The Spit Science Summary, Point Monroe¹⁰⁴ documents the
13 geomorphic and ecological effects of residential development at Point Monroe, noting "such
14 development has likely caused . . . impacts to water quality. Stormwater discharges from
15 roofs and residential septic systems are two potential sources of water quality impacts." *Id.*
16 at 10. Impacts to shoreline processes from shoreline armoring along and south of the spit
17 and impacts to native vegetation from residential structures and landscaping are also
18 documented.
19

20 Fletcher Bay is a barrier estuary on the west side of the Island. According to
21 Battelle's 2004 Nearshore Habitat Characterization and Assessment, the most impacted
22 controlling factor for habitat in Fletcher Bay is pollution.¹⁰⁵ Battelle (2004) recommended
23 checking and upgrading septic systems to improve water quality in Fletcher Bay.¹⁰⁶ The
24 Watershed Company (2012) noted shellfish closures from degraded water quality and called
25 for septic system upgrades in Fletcher Bay.¹⁰⁷
26

27 Petitioners argue that the waters of Point Monroe Lagoon and Fletcher Bay were
28 improperly designated Priority Aquatic B. Petitioners cite WAC 173-26-201(2)(d)(i):
29
30

31 ¹⁰⁴ Ex. 1616, Herrera Environmental Consultants, August 24, 2012.

32 ¹⁰⁵ Ex. 147, pp. 88-90, Reach 3518 to Reach 3523.

¹⁰⁶ Ex. 147, p. 84.

¹⁰⁷ Ex. E-171, The Watershed Company, Final Cumulative Impacts Analysis for the City of Bainbridge Island's
Shoreline: Puget Sound, March 2012, p. 12.

1 Reserve appropriate areas for protecting and restoring ecological function to
2 control pollution and prevent damage to the natural environment and public
3 health. In reserving areas, local governments should consider areas that are
4 ecologically intact from the uplands through the aquatic zone of the area,
5 aquatic areas that adjoin permanently protected uplands, and tidelands in
6 public ownership.

7 In Petitioners' view, priority aquatic designations should not be imposed where the uplands
8 are built out and no longer ecologically intact. Uplands at Point Monroe and Fletcher Bay
9 are fully developed, they say, and do not contain unique characteristics and resources
10 which will be damaged by continued use. PRSM Brief at 29. Further, Petitioners assert,
11 these waters have biophysical limitations caused by stormwater runoff from City streets and
12 failures of the City sewer systems.¹⁰⁸

13 The Board finds PRSM's arguments unpersuasive. The designation criteria of WAC
14 173-26-211(5)(c)(iii) require that all SMPs "[a]ssign an 'aquatic' environment designation to
15 lands waterward of the ordinary high water mark." The Bainbridge SMP creates a Priority
16 Aquatic designation applied to "aquatic areas of sensitive and unique ecological value,"
17 SMP §3.3.2.1, specifically including barrier lagoons and barrier estuaries. The Priority
18 Aquatic B designation is applied to areas that are waterward of the OHWM and adjacent to
19 uplands with a high level of existing development. SMP at 32-33, §§ 3.3.2.2 and 3.3.2.3.
20 Point Monroe Lagoon and Fletcher Bay clearly qualify under these criteria and are
21 appropriately so designated in the SMP. Further, the City has taken action to reduce risks of
22 biophysical limitations from stormwater by providing shoreline-specific standards in the
23 SMP.¹⁰⁹
24
25
26
27

28
29 ¹⁰⁸ While Petitioners brought forth no factual evidence, the Board notes several letters in Ecology's comment
30 file from Point Monroe residents complaining about silt-laden runoff into the lagoon from a culvert draining
31 Faye Bainbridge State Park. Exs. E-33-208, -209.

32 ¹⁰⁹ The SMP requires compliance with the City's Stormwater Management Manual, BIMC 15.20, which has
been specifically approved as meeting the requirements of the Clean Water Act through DOE's approved
NPDES permit WAR04-5503 for Bainbridge Island. SMP at 111, §4.1.6.6.1. The SMP also contains shoreline-
specific standards in order to ensure that stormwater runoff does not result in a net loss of shoreline functions.
SMP at 111-12, §4.1.6.6. These measures were approved by Ecology as likely to achieve no net loss. Ex. E-
010, p. 14.

1 Designation Strategy.

2 Finally, Petitioners argue that SMP § 3.4.4¹¹⁰ provides for the automatic
3 redesignation of land to Shoreline Residential Conservancy when a conservation easement
4 is granted. PRSM Brief at 30. They find this to be a violation of the SMA requirement that a
5 master program be amended consistent with the guidelines, as it appears to allow changing
6 of a shoreline designation without a legislative process.¹¹¹

7
8 Petitioners read § 3.4.4 out of context. The preamble to that section indicates § 3.4 is
9 a set of decision rules recommended by ETAC as a framework “to ensure consistent
10 application of shoreline residential criteria” in the 2014 SMP designation process. SMP at
11 36.¹¹² One of the decision rules is that a property which “has” a conservation easement “is
12 designated” Shoreline Residential Conservancy if it is adjacent to either Shoreline
13 Residential Conservancy or Island Conservancy. The text is clearly present-tense and does
14 not set up the automatic *future* redesignation of property that may subsequently be granted
15 a conservation easement. Petitioners’ argument to the contrary is without merit.¹¹³

16
17 **The Board finds** Petitioners have failed to carry their burden of demonstrating
18 violation of SMA and the guidelines by the City in its shoreline designation process.

19
20 **Conclusion for Legal Issue II**

21 The burden of proof required to be met by PRSM is to show (a) by clear and
22 convincing evidence that the provisions as they relate to shorelines of statewide significance
23

24
25 _____
26 ¹¹⁰ SMP §3.4.4: “If a property has a conservation easement and is adjacent to either a Shoreline Residential
27 Conservancy or Island Conservancy designation, then the property is designated Shoreline Residential
28 Conservancy.”

29 ¹¹¹ RCW 90.58.080(1): “Local governments shall develop or amend a master program for regulations of the
30 uses of the shorelines of the state consistent with the required elements of the guidelines. . . .”

31 ¹¹² “§3.4 Island Conservancy, Shoreline Residential and Shoreline Residential Conservancy Designation
32 Strategy. In general, shoreline designations criteria are based on the existing use, characteristics of the
shoreline environment, and modified by the expected land use. To ensure consistent application of shoreline
residential designation criteria a framework was developed to meet natural resource management strategies
recommended by the Environmental Technical Advisory Committee. The committee recommended using a
broad stroke approach to manage natural resources in an attempt to avoid a piecemeal development pattern.
The following rules apply. . . .”

¹¹³ While SMP Section 3.4 does not violate the SMA or guidelines, language clarifying that it applies to the
2014 designation process would be useful.

1 are inconsistent with the policy of RCW 90.58.020 and the applicable guidelines; or (b) the
2 provisions as they relate to shorelines are clearly erroneous in view of the entire record.

3 **The Board finds and concludes** PRSM has failed to meet either burden of proof to
4 establish violations of RCW 90.58.020, 90.58.080, 90.58.090(4), 90.58.100(2), RCW
5 36.70A.170 and .050, or violations of WAC 173-26-110, 173-26-191, or 173-26-221(2) in
6 regards to inclusion of required SMP elements, treatment of shorelines of statewide
7 significance, restrictions of development in critical areas, or application of its shoreline
8 designation process.
9

10 11 **Legal Issue III – Failure to Give Priority to Single Family Residential Uses**

12 **III-1. Whether the SMP fails to comply with RCW 90.58.020, RCW**
13 **90.58.030(3)(e), RCW 90.58.140 and guidelines referenced in the PFR in**
14 **considering single family residences and appurtenant structures to be**
15 **nonconforming and limiting their location, size, expansion, remodeling**
16 **or replacement and in imposing vegetation standards and conservation**
easements. PFR 30, 31, 32, 33, 35, 47,¹¹⁴ 48, 49, 50, 64, 65, 66.

17 **Applicable Law**

18 **RCW 90.58.020** provides in pertinent part,

19 [U]ses shall be preferred which are consistent with control of pollution and
20 prevention of damage to the natural environment . . . Alterations of the
21 natural conditions of the shorelines of the state, in those limited instances
22 when authorized, shall be given priority for single family residences and their
23 appurtenant structures. . . .

24 **RCW 90.58.030(3)(e)** defines the “substantial development” which requires special
25 permits (Shoreline Substantial Development Permits – SSDP) under the SMA. An SSDP
26 exemption is created for single family homes: “(vi) Construction on the shoreline . . . of a
27 single family residence for his own use or for the use of his or her family,” not to exceed 35
28 feet in height and meeting all the requirements of the local government with jurisdiction.
29 There is also an exemption for maintenance or repair: “(i) Normal maintenance or repair of
30 existing structures or developments, including damage by accident, fire or elements.”
31
32

¹¹⁴ PFR Issue 47 is addressed under Legal Issue VII-2 below.

RCW 90.58.140 provides for administration of SSDPs and begins:

- (1) A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, rules, or master program.

WAC 173-26-201(2)(d) Preferred Uses provides:

- (iv) Locate single-family residential uses where they are appropriate and can be developed without significant impact to ecological functions or displacement of water-dependent uses.

WAC 173-26-191(2)(a)(iii)(A) states the rule of prospective applicability:

While the master program is a comprehensive use regulation applicable to all land and water areas within the jurisdiction described in the act, its effect is generally on future development and changes to land use . . . In some circumstances, existing uses and properties may become nonconforming with regard to the regulations, and master programs should include provisions to address these situations in a manner consistent with achievement of the policy of the act and consistent with constitutional and other legal limitations.

WAC 173-26-122(5)(a) states:

Like other master program provisions, vegetation conservation standards do not apply retroactively to existing uses and structures, such as existing agricultural practices.

Statement of Facts – Shoreline Residential Uses

Seventy-five per cent of the Bainbridge Island marine shoreline is designated for single family residential uses, with a split of 37% Shoreline Residential and 38% Shoreline Residential Conservancy. Ex. E-010, p. 14. There are approximately 1600 shoreline residential property owners. City Brief at 8. Single family residential is a permitted use in the Urban, Shoreline Residential, and Shoreline Residential Conservancy designations, a conditional use in Island Conservancy, and prohibited in the Natural Designation. SMP, p. 41, Table 4.1. Prior to this update of the SMP, 35% of the shoreline properties were already

1 non-conforming, usually in relation to size of the lot or placement of the structure on the
2 lot.¹¹⁵ Under the new SMP, approximately 50% may be nonconforming.

3 4 **Discussion and Analysis**

5 Petitioners and Intervenor contend the SMP disregards the SMA preference for
6 single-family use of the shoreline. As summarized in the issue statement, the allegation is
7 that the SMP fails to comply with the policy preference for single family homes in RCW
8 90.58.020 and with the exemption from the shoreline substantial development permit
9 requirement in RCW 90.58.030(3)(e) and RCW 90.58.140. Three errors are alleged:
10

- 11 • considering existing single family residences and appurtenant structures to be
- 12 nonconforming;
- 13 • limiting their location, size, maintenance, remodeling or replacement; and
- 14 • imposing vegetation standards and conservation easements on existing
- 15 waterfront homes.

16 The Board first addresses the SMA policy preference for single-family homes, the
17 prospective nature of the SMP, and the SSDP exemption. In this context, specific
18 allegations concerning nonconformity, remodeling or replacement, and vegetation standards
19 are addressed.
20

21 22 Preferred Use

23 The Intervenor asserts the SMP impermissibly prohibits or restricts preferred single-
24 family uses. Realtors' Brief at 5. They point out the SMA allows alterations to the natural
25 condition of the land for preferred single family residential use, RCW 90.58.020, and
26 exempts home construction and maintenance from the SSDP process. RCW 90.58.030.
27 90.58.140. The Bainbridge SMP violates these provisions of the statute, in their view.
28

29 Intervenor argues these projects "do not need to be "vetted" in the same manner as
30 substantial development permit requests because the Legislature has already determined
31
32

¹¹⁵ Ex. E-33-224, Letter from Planning Commissioner Maradel Gale to DOE, August 21, 2013.

1 their preferential status.” In Realtors’ view, “the SMA mandates that Ecology must approve
2 alterations of the shorelines for preferred uses:

3 . . . Alterations of the natural condition of the shorelines of the state ...
4 shall be given priority for single family residences Alterations of the
5 natural conditions of the shorelines and shorelands of the state shall be
6 recognized by the department”

7 Realtors’ Reply at 7.

8 Realtors conveniently omit a key clause. The statute reads:

9 . . . Alterations of the natural condition of the shorelines of the state *in those*
10 *limited instances when authorized*, shall be given priority for single family
11 residences . . . Alterations of the natural conditions of the shorelines and
12 shorelands of the state shall be recognized by the department. . . .”

13 Ecology acknowledges single family residential development is a priority use in
14 shoreline jurisdiction. Ecology Brief at 10. However, development of new homes must be
15 consistent with producing no net loss of shoreline function or ecosystem-wide processes.

16 Ecology cites WAC 173-26-241(3)(j).

17
18 Master programs shall include policies and regulations that assure no net
19 loss of shoreline ecological functions will result from residential development.
20 Such provisions should include specific regulations for setbacks and buffer
21 areas, density, shoreline armoring, vegetation conservation requirements,
22 and, where applicable, on-site sewage system standards for all residential
23 development and uses and applicable to divisions of land in shoreline
24 jurisdiction.

25 Residential development, including appurtenant structures and uses, should
26 be sufficiently set back from steep slopes and shorelines vulnerable to
27 erosion so that structural improvements, including bluff walls and other
28 stabilization structures, are not required to protect such structures and uses.

29 WAC 173-26-241(3)(j).

30 The Board finds Realtors’ redacted version of RCW 90.58.020, while conveniently
31 supportive of its argument, changes the meaning of the statute. Filling in the ellipses in the
32 Realtors’ citation, RCW 90.58.020 qualifies preferred uses as those “which are consistent
with control of pollution and prevention of damage to the natural environment.” The priority
for shoreline homes (and other priority uses) shall be given “in those limited instances” when

1 “alterations of the natural condition of the shorelines of the state are authorized.” Ports,
2 parks, marinas, piers, and water-dependent industries are listed as priority uses along with
3 homes. None of these have unfettered right to development.¹¹⁶

4 The Bainbridge SMP provisions for residential development are consistent with the
5 statute and guidelines. The Goal is stated at SMP p. 181, §5.9.2:

6 Promote residential development opportunities along the shoreline that are
7 consistent with controlling pollution and preventing damage to the natural
8 environment, recognizing that single-family residential development is a
9 priority use in the shoreline and that impacts to other shoreline priority uses
10 such as shoreline views, aesthetics, and access, should be considered and
11 minimized.

12 The Policies, at SMP p. 181, §5.9.3, begin:

- 13 1. Consider single-family residential use as a priority use in the shoreline.
14 Develop single-family residences in a manner consistent with producing
15 no net loss of shoreline functions or ecosystem-wide processes, and in
16 conformance with the requirements of this shoreline master program.

17 The City’s statement of the priority for new single family development is consistent with the
18 statute and guidelines, in the Board’s view.

19
20 *SMP is Proactive, not Retroactive*

21 Petitioners’ complaint about the City’s failure to give priority to single family
22 residences is based, in large part, on its concern that the new SMP standards will be
23 applied to existing waterfront homes, landscapes, docks and piers, and bulkheads. The
24 SMP is clear that its provisions are not retroactive but apply only to new development.

25 The provisions of the Program apply to new development and activities and
26 are not retroactive. All existing legally constructed single-family residences
27 and accessory structures, including lawns, landscaping, and recreation
28 areas, which do not meet the adopted standards of the Shoreline Master
29 Program are allowed to continue, and may be maintained, repaired and
30 remodeled. . . .

31 ¹¹⁶ While Realtors are correct in stating single family residential use is one of the preferred uses under the
32 SMA, it is also true that “. . . private property rights are ‘secondary to the SMA’s primary purpose, which is ‘to protect the state shorelines as fully as possible.’” *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009) (citing *Lund v. Department of Ecology*, 93 Wn. App. 329, at 336-37).

1 SMP at 18, §1.3.5.2. Uses and structures that were lawfully established or constructed
2 prior to the effective date of the City's 1996 SMP and amendments are recognized as
3 legally established, may continue as they are, and be maintained. SMP at 121, § 4.2.1.3.
4 They are not required to meet the requirements of the new SMP unless the owner proposes
5 a change that would bring that structure under the new regulations. SMP at 121, § 4.2.1.2.
6 This could happen if a proposed change were to increase the non-conformity. SMP at 123,
7 §4.2.1.6.1.
8

9 Similarly, vegetation conservation provisions are not retroactive. The guidelines
10 specify: "Like other master program provisions, vegetation conservation standards do not
11 apply retroactively to existing uses and structures, such as existing agricultural practices."
12 WAC 173-26-122(5)(a). The SMP provides:

13 Vegetation management standards shall not apply retroactively to existing
14 lawfully established conforming and nonconforming uses and developments,
15 including maintenance of existing residential landscaping, such as lawns and
16 gardens.

17 SMP at 77, §4.1.3.4.1; also at 75, §4.1.3.1. The SMP mandates vegetation replanting as
18 mitigation for *new* development, uses or activities that alter existing native vegetation, or
19 vegetation in a required buffer or Vegetation Management Area. SMP at 71, § 4.1.2.5.
20 Maintenance of existing residential landscaping, lawns, or gardens is not subject to the
21 vegetation conservation provisions. SMP §4.1.3.4.1; §4.1.3.1.
22

23 There is no requirement that a legally established shoreline use¹¹⁷ or residential
24 structure be altered to become conforming. The SMP simply expresses a goal that over
25 time, nonconforming *uses* and nonconforming *commercial* structures be phased out as uses
26 cease or redevelopment of structures occurs. As home owners propose changes to existing
27 residences, residential structures may be brought into compliance or changes mitigated, but
28 residential *use* remains conforming and the preferred use in most of the shoreline
29 designations. SMP at 121, § 4.2.1.2.
30
31
32

¹¹⁷ As previously noted, single family residences are a conforming *use* in most shoreline designations.

1 SSDP Exemption

2 Petitioners and Intervenor contend that development exempt from the requirement to
3 obtain an SSDP must be exempted from any City permit or approval requirements in the
4 SMP. PRSM Brief at 36; Realtors' Brief at 5. The parties both argue:

5 Another significant defect which permeates the SMP is the requirement of
6 City "approval" for activities which the state law declares are exempt from
7 permitting. For instance, the SMP subjects minor changes to a shoreline
8 permitting process. This includes, for example, maintenance on property
9 used for single family residential use. See, e.g., SMP 4.1.2.5, 4.1.4.3,
10 4.1.3.5.8, and 7.2.3.1. This violates RCW 90.58.020, RCW 90.58.030, and
11 RCW 90.58.140, which declares these minor activities to be exempt from
12 shoreline permits.

13 PRSM Brief at 36; Realtors' Brief at 5.

14 The Board's review finds the argument for blanket exemption from other permit and
15 approval requirements in the shoreline jurisdiction is not well founded. New development
16 exempt from the requirement for an SSDP pursuant to RCW 90.58.030(3) is not exempt
17 from compliance with the SMA and the guidelines or from the City's SMP and other
18 development permit requirements. RCW 90.58.140(1) states:

19 A development shall not be undertaken on the shorelines of the state unless
20 it is consistent with the policy of this chapter and, after adoption or approval
21 as appropriate, the applicable guidelines, rules or master program.

22 The guidelines note that regulations adopted in a local master plan "apply to all uses
23 and development within shoreline jurisdiction, whether or not a shoreline permit is required,
24 and are implemented through an administrative process established by local government
25 pursuant to RCW 90.58.050 and 90.58.140 and enforcement pursuant to RCW 90.58.210
26 and 90.58.230." WAC 173-26-191(1)(a). Allowance of waterfront homes in a local master
27 plan must be consistent with no net loss. WAC 173-26-241(3)(j), SMP at 181, §5.9.3.1. This
28 includes vegetation management. "As with all master program provisions, vegetation
29 conservation provisions apply even to those shoreline uses and developments that are
30 exempt from the requirement to obtain a permit." WAC 173-26-221(5)(a).
31
32

Ecology's rules in this regard are in Chapter 173-27 WAC, Shoreline Management Permit and Enforcement Procedures. These rules are not within the GMHB scope of review, RCW 90.58.190(2). The Board gives deference to Ecology's interpretation of its own regulations.¹¹⁸ Under the WAC 173-27 regulations, "exemption" means local government authorization that an activity is "exempt from substantial development permit requirements under WAC 173-27-040, but subject to regulations of the act and the local master program." WAC 173-27-250(2).¹¹⁹ The Ecology regulations define "permit" to include SSDPs, variances, conditional use permits, permits related to mineral exploration and forestry, and *shoreline exemptions*. WAC 173-27-040(1)(a).

In this context, the Bainbridge SMP's program provisions and administrative procedures, at SMP §§1.3.5, 1.3.6, and 1.3.7 are consistent with Ecology's regulations. Development exempt from an SSDP may require a conditional use permit, a variance, or a letter of exemption. SMP at 18, § 1.3.5.4. The City's procedures are found in its building code at BIMC 2.16.165.C-E. Ecology Brief, Appendix A. Additionally, building permits, clearing and grading permits, and other city requirements may apply. The logical conclusion of PRSM's and Realtors' arguments would render numerous City regulations inapplicable in the shoreline jurisdiction on the basis of exemption from the SSDP process. Although Petitioners in their reply deny that is their argument, PRSM Reply at 4, it is clear that under WAC 173-27-040(1)(b) "An exemption from the substantial development permit process is not an exemption from compliance with the act *or the local master program*, nor from any other regulatory requirements." (emphasis added).

Non-conforming and Existing Development

PRSM asserts the statutory priority for shoreline homes is violated because the SMP, in effect, declares *all* existing residential development as non-conforming. PRSM Brief at 31.

¹¹⁸ *Hama Hama Co. v. Shorelines Hearings Board*, 85. Wn.2d 441, 449, 536 P.2d 157 (1975); *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

¹¹⁹ See, *Ass'n of Washington Business v. Dep't of Ecology*, SHB No. 00-037, Order Granting and Denying Appeal, (Aug. 28, 2001), at 19, n.7: "Because all development must be consistent with the SMA and applicable master program, including exempt substantial shoreline development, Ecology may properly require policies and use regulations for exempt uses within a master program."

1 This argument is built around a tenuous reading of SMP §4.2.1, the chapter governing
2 Nonconforming Uses, Non-Conforming Lots, and Existing Development. The Applicability
3 provisions of that chapter, SMP §4.2.1.1, state: “This section applies to shoreline uses
4 and/or structures that were lawfully established or constructed prior to the effective date of
5 the initial adoption of the Master Program (November 26, 1996) or its amendments, but
6 which do not conform to present regulations or standards of the Master Program.” During
7 the City Council adoption process, the words “non-conforming structure” were amended to
8 “existing development.”¹²⁰ Then a definition of “existing development” was inserted to clarify
9 that the term as used in the SMP referred only to structures not conforming to the 1996
10 SMP as updated. “Existing development” is defined as “legally established structures which
11 do not conform to the provisions in the 1996 Shoreline Master Program, as amended by [the
12 present SMP update].” SMP at 237. This definition mirrors Ecology’s shoreline permits and
13 enforcements regulations, which define “nonconforming use or development,” to mean “a
14 shoreline use or development which was lawfully constructed or established prior to the
15 effective date of the act or the applicable master program, or amendments thereto, but
16 which does not conform to present regulations or standards of the program.” WAC 173-27-
17 080(1).

18
19
20 Petitioners point to SMP § 4.2.1.6.1, which prohibits changes to a structure that
21 would alter or increase the nonconformity, in support of the proposition that *all* structures are
22 nonconforming. PRSM Brief at 33. However, the Applicability section (in addition to the
23 definition of “existing development”) clarifies that SMP § 4.2.1.6.1 applies only to shoreline
24 uses and/or structures that are already nonconforming; i.e., that were lawfully established or
25 constructed prior to adoption of the 1996 Master Program, “but which do not conform to
26 present regulations or standards of the Master Program.” SMP at 121, §4.2.1.1. To construe
27 the term “existing development,” when viewed in light of the SMP definition and context, to
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¹²⁰ PRSM Brief, at 31: This revision was a response to “substantial public opposition to the reference to existing structures as being nonconforming.”

1 mean that every single built structure in the shoreline jurisdiction is nonconforming leads to
2 absurdity.¹²¹

3 RCW 90.58.620(1), adopted in 2011, permits a city to consider certain
4 nonconforming residential structures to be conforming. Under that statute, a new or
5 amended master program “may include provisions authorizing:

- 6
- 7 (a) Residential structures and appurtenant structures that were legally
8 established and are used for a conforming use, but that do not meet
9 standards for the following to be considered a conforming structure:
10 Setbacks, buffers, or yards; area; bulk; height; or density;
 - 11 (b) Redevelopment, expansion, change with the class of occupancy, or
12 replacement of the residential structure if it is consistent with the master
13 program, including requirements for no net loss of shoreline ecological
14 functions.

15 Petitioners argue the City’s refusal to enact the first provision shows it “is unwilling to protect
16 existing residential development from the nonconforming label and consequences.” PRSM
17 Brief at 34. However, this statute is permissive, not mandatory, stating that amended
18 master programs “may” include such provisions. The City enacted the second provision
19 allowing redevelopment, expansion, or replacement of nonconforming residences when
20 consistent with no net loss. In declining to enact the first provision, the City has not violated
21 the law.¹²²

22 The SMP is clear that its provisions are not retroactive but apply only to new
23 development. SMP at 18, §1.3.5.2. Not all the creativity of Petitioners and Intervenor can
24 make it otherwise. Uses and structures that were lawfully established or constructed prior to
25 the effective date of the City’s prior SMP and present update are recognized as legally
26 established, may continue as they are, and be maintained. SMP at 121, § 4.2.1.3. They
27 are not required to meet the requirements of the new SMP unless the owner proposes a
28

29 ¹²¹ Thus Petitioners’ reason that because no section of the SMP addresses structures that both exist and do, in
30 fact, conform to the new SMP, the City has obviously declared that conforming, existing structures cannot
31 exist. But if a structure complies with the SMP’s regulations, then it is self-explanatory that the structure can
32 continue to exist.

¹²² Ecology reads this differently. “The SMP submitted to Ecology uses the term ‘existing structures’ for
residential structures rather than ‘nonconforming’ for residential structures, so the City did in fact opt not to use
the term ‘nonconforming’ as authorized under the statute.” Ex. E-013, Ecology Answers to Public Comments,
p. 15.

1 change that would bring that structure under the new regulations. SMP at 121, § 4.2.1.2.
2 This could happen if a proposed change were to increase nonconformity. The Board has
3 not found and the parties have not identified any SMP requirement that an unchanged,
4 legally-established shoreline use or structure must be affirmatively altered to become
5 conforming.

6 **The Board finds** Petitioners have not demonstrated that the SMP treats all existing
7 shoreline homes as nonconforming or that the cited SMP provisions negate the statutory
8 preference for shoreline single family residences.
9

10
11 *Maintenance, Repair, Remodel, and Replacement*

12 Petitioners assert: "There are many ways in which the City has acted in violation of
13 the SMA's policy that single family residential use is a preferred and priority use of the
14 shorelines." PRSM Brief at 35. They challenge the SMP provisions applicable to non-
15 conforming structures as unreasonably restrictive of repair, remodeling and replacement.

16 The Board notes the SMP provides that "[a]ll existing legally constructed single family
17 residence and accessory structures, including lawns, landscaping and recreation areas,
18 which do not meet the adopted standards of this Shoreline Master Program are allowed to
19 continue, and may be maintained, repaired, and remodeled." SMP at 18, § 1.3.5.2. Normal
20 maintenance and repairs are expressly allowed under SMP § 4.2.1.6.1 if changes to the
21 structure do not increase the nonconformity and several other criteria are met.
22

23 PRSM claims the SMP limits repair of residences only to situations where a
24 residence is destroyed by natural causes. PRSM Brief at 35. SMP §§ 1.3.5.2; 4.2.1.6.1.2.
25 In PRSM's view, this conflicts with the SMA allowance for "normal maintenance or repair of
26 existing structures or developments, including damage by accident, fire, or elements" to
27 proceed without a substantial development permit. RCW 90.58.030(e)(i). In fact, under the
28 SMP, restoration or replacement is available to any existing primary structure that was
29 destroyed by fire, explosion, earthquake, flood, *or other casualty*. SMP at 124, § 4.2.1.6.1.2.
30 The structure may be restored or replaced to the same bulk dimensions existing
31 immediately prior to the catastrophic event, provided certain minimum provisions are met:
32

- The residence must meet the general use and non-conforming use regulations (found at SMP §§ 4.2.1.4. and 4.2.1.5).
- The destruction must not have been caused by a criminal act initiated by the property owner. SMP §4.2.1.6.1.2(a).
- The replacement structure shall not warrant new shoreline stabilization for the life of the new structure. SMP §4.2.1.6.1.2(b).
- The replacement structure must comply with regulations for geologically hazardous areas. SMP §4.2.1.6.1.2(c).

Ecology comments: "If these few provisions are met, the structure can be rebuilt to its prior dimensions. It may also potentially be expanded pursuant to Section 4.2.1.6.3.2-4. SMP at 124 § 4.2.1.6.3.1. If the provisions set out above cannot be met, the existing use is still permissible, and the structure can still be rebuilt. It would just have to be rebuilt in conformance with the regulations for new development." Ecology Brief at 10-11. The Board finds Petitioners' objections are without merit.

There is certainly a drafting error in SMP § 4.2.1.6.1. PRSM is correct that SMP § 4.2.1.6.1.(c) "Renovations or remodels are entirely contained within the building" cannot be reconciled with SMP §4.2.1.6.1.1.(a)(ii) "Adding to the footprint of an existing structure is permitted. . . ." ¹²³ The error, however, does not violate any provision of the SMA or guidelines cited by Petitioners under this legal issue and is not a basis for remand.

PRSM protests height limits in allowed remodels. PRSM Brief at 35. PRSM points out the SMA declares that construction of single family residences is exempt from the substantial development permit process if they are under 35 feet in height (RCW 90.58.020 and RCW 90.58.030(3)(e)(vi)), but complains the City completely disallows the use and the SMA exemption for such use, if the construction is greater than 30 feet in height or involves a second story, or is greater than 25% expansion in space. SMP at 49, §4.2.1.6.3.2.a. ¹²⁴

The City's 30-foot height limitation on shoreline residences was established to protect marine views. ¹²⁵ The SMA's 35-foot maximum does not require the City to amend its existing shoreline height limits.

¹²³ Perhaps "or" was omitted from the text inadvertently.

¹²⁴ See *also*, SMP §4.2.1.6.3.2.b: "Any vertical expansion must meet height requirements of this Program."

¹²⁵ Ex. 2118, Transcript March 13, 2013, City Council Public Hearing, p. 53: Gary Tripp: "We've got a 30-foot limitation on homes on the waterfront to protect views."

1 Petitioners also allege an internal inconsistency in SMP allowance for replacement of
2 damaged or destroyed homes. They point out SMP §4.2.1.2 allows maintenance, repair,
3 remodel and replacement but assert SMP §4.2.1.3 omits replacement. PRSM Brief p. 36.

4 PRSM's dilemma is readily resolved. SMP §4.2.1.2 is a Goal statement: "It is the
5 purpose of this program to recognize legally established primary residential structures, and
6 to allow them to be maintained, repaired, remodeled, replaced and in some cases expanded
7 in conformance with these rules." SMP §4.2.1.3 is a list of supporting policies. Relating to
8 "lawfully constructed residential structures," paragraph (3) says such structures may be
9 "repaired, maintained, and remodeled," paragraph (7) provides, if destroyed, such structures
10 may be "restored or replaced," and paragraph (8) adds that reconstruction shall allow
11 expansion of a lawfully constructed residence under certain conditions.
12

13 In sum, **the Board finds** none of the SMP provisions objected to by Petitioners
14 amounts to a disregard for the priority accorded single family homes in the SMA and
15 guidelines.
16

17 Appurtenant structures

18 Petitioners protest the SMP prohibition of structures in Zone 1 of the shoreline buffer
19 which are appurtenant to single family residences, if the property is adjacent to a Priority
20 Aquatic designation. SMP p. 86, §4.1.3.8.3. PRSM contends this conflicts with the SMA
21 exemption from substantial development permits for single family dwellings, which includes
22 appurtenances within the scope of the exemption.
23

24 "Single-family residence" means a detached dwelling designed for and
25 occupied by one family including those structures and developments within a
26 contiguous ownership which are a normal appurtenance. An 'appurtenance' is
27 necessarily connected to the use and enjoyment of a single-family residence
28 and is located landward of the ordinary high water mark and the perimeter of a
29 wetland. On a statewide basis, normal appurtenances include a garage; deck;
30 driveway; utilities; fences; installation of a septic tank and drainfield and
31 grading which does not exceed two hundred fifty cubic yards. . . .
32

1 WAC 173-27-040(2)(g).¹²⁶ This is another instance of the SMP's hostility to shoreline
2 homes as a priority use, in Petitioners' minds. PRSM Brief at 36.

3 The City counters that the priority given these structures does not mean they must be
4 allowed in all shoreline areas. City Brief at 23. The Board concurs. RCW 90.58.020
5 brackets the list of priority uses with "consistent with the control of the pollution," "prevention
6 of damage to the natural environment," and "in those limited instances when authorized."
7 WAC 173-26-241(3)(j) specifically requires that local master programs "include policies and
8 regulations that assure no net loss of shoreline ecological functions will result from
9 residential development . . . includ[ing] specific regulations for setbacks and buffer
10 areas. . . ."

11
12 The City's Zone 1 shoreline buffer has been specifically designated to protect marine
13 riparian areas that "are critical to sustaining many ecological functions" of the shorelines.
14 SMP at 321, 323, SMP Appendix C. The Bainbridge SMP creates a Priority Aquatic
15 designation applied to "aquatic areas of sensitive and unique ecological value." SMP
16 §3.3.2.1. Prohibiting garages, decks, driveways, septic tanks and drainfields, and other
17 appurtenant structures within the 30-foot vegetative buffer above these sensitive and unique
18 aquatic areas does not violate the SMA's preference for waterfront homes.¹²⁷

19
20 **The Board finds** the SMP restriction on appurtenant structures in Zone 1 buffers
21 above Priority Aquatic waters does not violate the SMA preference for shoreline homes.
22

23 *Point Monroe Provisions*

24 Petitioners assert the SMP restrictions on single family residences and
25 appurtenances at Point Monroe conflict with the SMA's priority for those uses. PRSM Brief
26 at 37. Far from indicating a bias against single family homes, as Petitioners suggest, the
27 Board reads the SMP as providing Point Monroe homeowners with exceptional allowances.
28

29 As noted above, the Point Monroe spit consists of a narrow strip of land bounded on
30 one side by Puget Sound and on the other by Point Monroe Lagoon. A roadway bisects the
31

32 ¹²⁶ PRSM lists beach furniture as well as structures. PRSM Brief at 36.

¹²⁷ For Point Monroe, accessory structures are permitted in the Zone 1 buffer 15 feet from the OHWM. SMP §5.9.7.2.

1 spit for its entire length, providing for two rows of waterfront homes. The area is built out
2 with homes on narrow lots,¹²⁸ some of the homes on fill extending into the intertidal area.
3 The City commissioned a Spit Science Summary for Point Monroe to determine how to
4 achieve no net loss of ecosystem functions and processes. Ex. 1616.

5 The Spit Science Summary identified the geomorphic processes providing sediment
6 to the spit, along with changes induced by shoreline armoring, the presence of migratory
7 fish along the Sound and in the lagoon, the persistence of native vegetation – dune grass
8 and pickleweed, the impact of impervious surfaces, including roads and structures, and the
9 sources of pollution – runoff from the road and roofs and septic system failures.

10 Based on the spit science, the City created SMP regulations specific to Point Monroe.
11 City Brief at 15. On the one hand, the regulations make allowances for the small lots on the
12 spit. On the other hand, they limit increases in impervious surface, which the Spit Science
13 Summary identified as the primary threat to the loss of ecological functions.

14 For Point Monroe, the maximum development area per lot is 1400 square feet. SMP
15 § 5.9.6.2.a. New accessory dwelling units are prohibited. SMP § 5.9.4.4. Side setbacks are
16 only 15% of lot width compared to a normal 30% of lot width. SMP § 5.9.5.8. New primary
17 structures are allowed 30 feet from the OHWM. SMP § 5.9.6.2.b. Accessory structures are
18 allowed a mere 15 feet from the OHWM. SMP § 5.9.7.2.¹²⁹ Special provisions for vegetation
19 management recognize the ecological importance of the remaining dune grass and salt
20 marsh plant communities. SMP § 5.9.5.7; SMP § 4.1.3.5.9. New or replacement hard
21 shoreline armoring is prohibited or restricted, SMP at 42, 48, in recognition of the sediment
22 accumulation processes documented in the Spit Science Summary. Petitioners have not
23 demonstrated that these regulations demonstrate a bias against waterfront homes. Rather,
24 it appears to the Board the SMP made special provision to accommodate the Point Monroe
25
26
27
28
29

30 ¹²⁸ While most of the Shoreline Residential and Shoreline Residential Conservancy designations are zoned R-
31 1 or R-2, Point Monroe is Zoned R-6 – six homes per acre. SMP Appendix A. The Spit Science Summary
32 suggests three additional lots will be developed. Ex. 1616, at 5.

¹²⁹ WAC 173-27-040(2)(g) states: "On a statewide basis, normal appurtenances include ... installation of a
septic tank and drainfield." The Board hopes there are health regulations that would prevent septic tanks and
drainfields from being installed within 15 feet of OHWM on Point Monroe spit.

1 community while endeavoring to minimize further loss of beach processes and ecological
2 functions.

3 **The Board finds** petitioners have failed to demonstrate the special regulations in the
4 SMP for Point Monroe violate the SMA's priority for single family residences.¹³⁰

5
6 Vegetation Standards

7 The vegetation requirements in the SMP, according to Petitioners and Intervenor,
8 conflict with (1) the SMA's declaration that single family residential use is a preferred
9 shoreline use, (2) the SMA exemption from the SSDP permit process, and (3) WAC 173-26-
10 221(5)(a) which recognizes that new vegetation rules do not apply retroactively to existing
11 residential uses. PRSM Brief at 37-41; Realtor's Brief at 5. Petitioners contend, first, that the
12 SMP vegetation standards are, in effect, retroactive. The parties object to the requirement
13 for a clearing permit for SSDP-exempt activities. And Petitioners argue the "assurances"
14 required to ensure survival of new plantings are an unlawful conservation easement.
15

16 Petitioners' argument that the prospective nature of the standards is illusory (PRSM
17 Brief at 38) is based on looking only to the general applicability provisions of the vegetation
18 standards, which provide, at SMP, p. 75, SMP §4.1.3.1: "[V]egetation standards do not
19 apply retroactively to existing uses *unless changes or alterations are proposed.*" (Emphasis
20 added.) Given the open-endedness of "changes or alterations," Petitioners fear mere weed
21 pulling or flower planting may trigger application of the new standards.
22

23 However, looking to the regulations themselves, the Board finds that maintenance of
24 existing residential landscape, including lawns and gardens, is exempt from the standards.
25 "Mere weed pulling or flower planting" is not subject to regulation. SMP at 77, § 4.1.3.4.
26 Removal of vegetation with a mainstem of less than three inches, removal of noxious or
27 invasive weeds, and removal of hazard trees are exempt from the standards under the
28 specified conditions. SMP at 77, § 4.1.3.4.3. Additional vegetation removal not associated
29 with new construction is also allowed with an approved clearing permit. SMP at 81, §
30 4.1.3.5.8. The vegetation standards referenced with alarm by Petitioners (PRSM Brief at
31
32

¹³⁰ The question whether this regulatory scheme is likely to meet the no-net-loss standard is not before the Board.

39-40) are in fact the revegetation standards that are required with *new* development – SMP Section 4.1.2 – and are not retroactively applicable to maintenance of existing landscaping.

Requirement for a clearing permit raises additional objection. Petitioners explain:

The City makes vegetation standards applicable retroactively to existing uses and structures by narrowly defining use and making every “human activity” with regard to homeowners’ homes and yards subject to City approval. SMP 4.1.2.1, 4.1.2.5, 4.1.3.7, and 4.1.2.5.1. For instance, SMP 4.1.4.3 prohibits “all clearing and/or grading not associated with an approved development, use or activity unless specifically provided in SMP.” “Clearing” is broadly defined to include any removal of vegetation (or plant cover). SMP at 231. Minor vegetation removal outside of the buffer is allowed, but still requires a permit. SMP 4.1.3.5.8.

PRSM Brief at 38-39. Ecology in response states the parties “fail to explain why the City’s ordinances regulating clearing permits anywhere in the jurisdiction should not apply within shoreline jurisdiction. See BIMC Section 15, Appendix A.”¹³¹

Finally, Petitioners point to the surety requirements of SMP § 4.1.2.7, which provides:

The applicant/property owner shall provide assurance to the satisfaction of the Administrator, that the restoration area (including off-site mitigation) will be maintained in perpetuity. The assurance can be in the form of notice on title, conservation easement, or similar mechanism as approved by the City Attorney.

In Petitioners’ view, establishing a conservation easement – “an area of one’s property where the City perpetually dictates the vegetation and activities that occur on the site” – conflicts with the SMA’s declaration that single family property is exempt from the SSDP process and violates WAC 173-26-221(5)(a) which recognizes new vegetation standards cannot apply to existing shoreline homes and yards. PRSM Brief at 39. The Board notes again that SMP Section 4.1.2 applies to new development. The assurances

¹³¹ The Board notes WAC 173-26-221(5)(b) authorizes local governments to implement the objectives of vegetation management through a variety of measures, including “clearing and grading regulations, setback and buffer standards, critical area regulations, conditional use requirements for specific uses or areas, mitigation requirements, incentive and non-regulatory programs.”

1 required in SMP § 4.1.2.7 apply only to vegetation standards imposed in mitigation of new
2 development, not to existing residential uses.

3 On the facts and arguments presented, **the Board finds** Petitioners and Intervenor
4 have failed to demonstrate that the SMP vegetation standards conflict with the SMA's
5 declaration that single family residential use is a preferred shoreline use, with the SMA
6 exemption from the SSDP permit process, or with the WAC 173-26-221(5)(a) declaration
7 that new vegetation rules do not apply to existing residential uses.¹³²
8

9 **Conclusion for Legal Issue III**

10 The burden of proof required to be met by PRSM is to show (a) by clear and
11 convincing evidence that the provisions as they relate to shorelines of statewide significance
12 are inconsistent with the policy of RCW 90.58.020 and the applicable guidelines; or (b) the
13 provisions as they relate to shorelines are clearly erroneous in view of the entire record.
14

15 **The Board finds and concludes** PRSM and Intervenor have failed to meet either
16 burden of proof to establish violations of RCW 90.58.020, 90.58.030(3)(e), 90.58.140, or
17 violations of WAC 173-26-110, 173-26-191, or 173-26-221(5) in regards to the preferred
18 status of single-family residential uses, the non-retroactivity of SMP provisions, the
19 exemption from the shoreline substantial development permit for shoreline homes and
20 appurtenances, and the vegetation management standards applicable to existing homes.
21
22

23 **Legal Issue IV – Other Shoreline Substantial Development Permit Failures**

24 **IV-1. Whether the City's definition of "development," and therefore, scope of**
25 **the City's SMA regulation, is not in compliance with the definition**
26 **provided by the SMA in RCW 90.58.030(3)(a). SMP at p. 233. PFR 34.**

27 **Discussion and Analysis**

28 For purposes of establishing requirements for shoreline substantial development
29 permits, or exemptions therefrom, the SMA defines "development" in **RCW 90.58.030(3)(a)**
30 as follows:
31

32 ¹³² Whether the vegetation regulations for new development enacted in the SMP otherwise comply with the guidelines, are likely to achieve no net loss, or are impermissibly restrictive is not before the Board in this appeal.

1 "Development" means a use consisting of the construction or exterior alteration
2 of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or
3 minerals; bulkheading; driving of piling; placing of obstructions; or any project of
4 a permanent or temporary nature which interferes with the normal public use of
5 the surface of the waters overlying lands subject to this chapter at any state of
6 water level;

7 The City's SMP defines "development" in essentially the same way but adds a
8 sentence:

9 A use consisting of the construction or exterior alteration of structures;
10 dredging; drilling; dumping; filling; removal of any sand, gravel, or materials;
11 bulkheading; pile driving; placing of obstructions; or any project of a
12 permanent or temporary nature which interferes with the normal public use of
13 the surface of the waters overlying lands subject to the Act at any state of
14 water level, subject to RCW Chapter 90.58 or its successor [RCW
15 90.58.030(3)(d) or its successor]. *This term may include activities related to*
16 *subdivisions and short subdivisions; clearing activity; land modification*
(grade and fill work); building or construction; and activities that are exempt
from the substantial development permit process or that require a shoreline
variance or conditional use.

17 SMP at 233.

18 PRSM claims that the SMP's definition of development conflicts with state law
19 because, while the statute is limited to building or alteration of land, the SMP includes
20 "clearing activity" and "activities that are exempt from the substantial development permit
21 process." PRSM Brief at 41-42. PRSM points to the broad definition of "clearing" in the
22 SMP:
23

24 Clearing – Clearing means the destruction or removal of vegetation or plant
25 cover including, but not limited to, root material removal by manual,
26 mechanical, or chemical means. Clearing includes, but is not limited to, actions
27 such as cutting, felling, thinning, flooding, killing, poisoning, girdling, or
28 uprooting.

29 SMP at 230. Thus normal weeding (uprooting) and pruning (thinning) becomes regulated
30 "development" under PRSM's reading of the Bainbridge SMP.
31

32 Ecology points out clearing and significant vegetation removal are identified in WAC
173-26-231(1) as examples of shoreline modifications: "Shoreline modifications . . . can

1 *include* other actions such as *clearing*, grading, application of chemicals, or *significant*
2 *vegetation removal*.” (emphasis added)

3 The Board notes the guidelines require the local master program to regulate
4 shoreline modifications: reduce their adverse effect, limit their number and extent, allow only
5 modifications appropriate to the particular shoreline, and assure no net loss of ecological
6 functions. WAC 173-26-231(2). Thus activities such as clearing or significant vegetation
7 removal that may be exempt from the SSDP are not exempt from regulation and compliance
8 with the SMA, the guidelines, and the SMP. They may require other types of permits and
9 approvals.¹³³ The SMP definition appropriately extends to other activities which it is required
10 to regulate.
11

12 None of the parties has provided the Board with any case law or authorities on this
13 issue. However, the burden of proof lies with the Petitioners, who provide only bare
14 assertions and speculation. **The Board finds** they have failed to demonstrate the SMP
15 definition of “development” is inconsistent with the SMA and the guidelines.
16

17
18 **IV-2. Whether SMP provisions concerning piers, docks and floats fail to comply**
19 **with RCW 90.58.020, 90.58.030(3)(e)(vii), WAC 173-27-040(2)(h), WAC 173-26-**
20 **231(3)(b), and WAC 173-26-201(2)(d)(iv). PFR 36, 37, 38, 67, 68. Together with**
21 **IV-5. Whether SMP provisions concerning buoys fail to comply with RCW**
22 **90.58.030(3)(e)(v). PFR 51, 52.**

23 **Applicable Law**

24 The policy of the SMA – **RCW 90.58.020** – identifies piers as a priority use in the
25 shoreline. **RCW 90.58.030(3)(e)(vii)** provides an exemption from requirement for a shoreline
26 substantial development permit for “construction of a dock, including a community dock,
27 designed for pleasure craft only, for the private non-commercial use” of single or multi-family
28 homeowners.¹³⁴ **RCW 90.58.030(3)(e)(v)** exempts “construction or modification of
29 navigational aids such as channel markers and anchor buoys.”
30

31 ¹³³ As noted previously, clearing is commonly regulated by local governments. The City’s clearing/grading
32 regulation, BIMC Chap. 15.18, is provided as Appendix A to Ecology’s Brief.

¹³⁴ Ecology’s Permits and Enforcement regulations explain, at WAC 176-27-040(2)(h): “A dock is a landing and
moorage facility for watercraft and does not include recreational decks, storage facilities or other
appurtenances.”

WAC 173-26-231(3)(b) provides:

New piers and docks shall be allowed only for water-dependent uses or public access. As used here, a dock associated with a single-family residence is a water-dependent use provided that it is designed and intended as a facility for access to watercraft and otherwise complies with the provisions of this section.

Pier and dock construction shall be restricted to the minimum size necessary to meet the needs of the proposed water-dependent use. . . .

Where new piers or docks are allowed, master programs should contain provisions to require new residential development of two or more dwellings to provide joint use or community dock facilities, when feasible, rather than allow individual docks for each residence.

Piers and docks, including those accessory to single-family residences, shall be designed and constructed to avoid or, if that is not possible, to minimize and mitigate the impacts to ecological functions, critical areas resources such as eelgrass beds and fish habitats and processes such as currents and littoral drift. See WAC 173-26-221 (2)(c)(iii) and (iv). Master programs should require that structures be made of materials that have been approved by applicable state agencies.

Statement of Facts – Docks and Piers

Residential uses occupy approximately 75% of the City's shorelines. Along those 75% of shorelines, there are several hundred existing docks that are allowed to be repaired and replaced. Ex. E-013, p. 13.

The SMP allows docks and piers as a permitted use in the Urban, Shoreline Residential and Aquatic designations and a conditional use in Shoreline Residential Conservancy and Island Conservancy. New docks and piers are prohibited in the Natural and Priority Aquatic A designations, in Murden Cove and Blakely Harbor, and locations where critical physical limitations exist. SMP p. 204-05, §§ 6.3.4, 6.3.5.

The SMP allows mooring buoys in every shoreline designation except Natural and Priority Aquatic. SMP, p. 41, Table 4-1. Mooring buoys are limited to one every 100 feet and must not be within 60 feet of any other overwater structure such as a dock or float. SMP, p. 58, § 6.3.7.7.3.

1 **Discussion and Analysis**

2 Petitioners raise two objections to the SMP provisions for piers, docks, and floats.
3 The first is readily resolved: Petitioners' objection that the SMP allows floats only for tie-up
4 of watercraft, not for swimming and diving. PRSM Brief at 43. SMP § 6.3.1.3 states:

5 A pier, dock or float associated with a single-family residence is considered a
6 water-dependent use provided that it is designed and intended as a facility
7 for to [sic] tie up watercraft.

8 The language is taken directly from WAC 173-26-231(3)(b): "As used here, a dock
9 associated with a single-family residence is a water-dependent use provided that it is
10 designed and intended as a facility for access to watercraft."
11

12 The SMP doesn't disallow recreational floats, but simply regulates them in a different
13 section. Floats for docking are regulated in SMP at 207-08, §§ 6.3.7.3 and 6.3.7.3.1, along
14 with docks and piers. Recreational floats are defined as "float[s] used primarily for
15 swimming, diving, water skiing or other recreational purpose and not for the moorage of
16 water craft." SMP at 238. Recreational floats are regulated in SMP, pp. 211 and 213, §§
17 6.3.7.7.1 and 6.3.7.8.(7 – 10).¹³⁵ Watercraft floats are allowed offshore from the Urban and
18 Shoreline Residential Designations (39% of the Bainbridge shoreline); recreational floats
19 are allowed offshore from all shoreline designation except the 1% of the shores designated
20 Natural. SMP Table 4-1, p. 41.
21

22 **The Board finds** the SMP provisions for floats do not violate the SMA's priority for
23 water-dependent uses.
24

25 PRSM's second issue is more difficult and evokes a decade or more of contention on
26 Bainbridge Island. PRSM asserts the City is not in compliance with the SMA and the
27 guidelines in restricting and prohibiting docks for single family residences. Petitioners point
28 to a map provided by the City entitled "Dock Prohibition Layer Draft," Supp. Ex. 11, which
29 maps the various reasons for denying new docks: presence of feeder bluffs, USGS-mapped
30 landslides, various shore slope configurations, Priority Aquatic designations, Murden Cove,
31 and Blakely Harbor. PRSM concludes: "With all of these circumstances under which docks
32

¹³⁵ The Petitioners' confusion is understandable; these provisions are not a model of clarity.

1 are prohibited, virtually throughout the City, the City has effectively eliminated this
2 appurtenant use despite state law.” PRSM Brief, at 43.

3 PRSM and the Realtors contend the City is prohibited from regulating docks for
4 single family residences. PRSM Brief at 43-44; Realtors’ Brief at 12-14. However, RCW
5 90.58.620, enacted in 2011, specifically addressed the status of existing docks under
6 updated master programs. While the statute allows existing waterfront homes and
7 appurtenances to be considered conforming, no such allowance is made for docks. “For
8 purposes of this section . . . appurtenant structures does not include . . . overwater
9 structures.” Further, “Nothing in this section . . . restricts the ability of a master program to
10 limit redevelopment, expansion or replacement of overwater structures located in hazardous
11 areas, such as flood plains and geologically hazardous areas.” RCW 90.58.620(2), (3).
12

13 The City’s fine-scale 2004 Battelle Nearshore Habitat Characterization, Ex. 147, and
14 2010 Coastal Geomorphic/Feeder Bluff Mapping, Ex. 117, gave the City specific
15 documentation and mapping of shoreline geomorphic conditions – drift cells, feeder bluffs,
16 shoreline slopes, landslide hazards – and biological resources – eelgrass meadows, forage
17 fish spawning areas, shellfish beds, and other critical habitats. This properly informed the
18 SMP regulation of docks and other over-water structures. Areas where new docks are
19 prohibited are those areas with critical physical limitations. SMP at 204, § 6.3.4.2. As
20 summarized by Ecology, Ex. E-013, p. 13, these include:
21

- 22 • Areas of high accretion, which could result in docks being unusable
23 without dredging or in docks impacting the ecological functions of the
24 accretion areas;
- 25 • Geologically hazardous areas, including feeder bluffs and places where
26 landslide risks are mapped;
- 27 • Shallow sloping tidelands, including wide tidal flats such as Murden Cove.
28 Because docks in areas with shallow bottoms often require much longer
29 docks to avoid impacting the aquatic substrate, longer docks may pose
30 risks to navigation.

31 Avoidance of new docks in these areas is consistent with the requirement to prevent
32 damage to the natural environment and to public safety. WAC 173-26-201(2)(d)(i).

1 The City's stated policy is to encourage multiple-use and expansion of existing
2 conforming piers, docks and floats over the addition of new facilities. SMP at 202, §
3 6.3.3.1. Joint use facilities and mooring buoys are preferred. SMP at 202, § 6.3.3.1. This
4 is consistent with the guidelines' preference for minimizing the impact to ecological function
5 that these overwater structures may entail. WAC 173-26-231(3)(b).¹³⁶

6 Washington case law, including the cases directly bearing on Bainbridge Island's
7 regulation of private docks, demonstrates how contentious the issue can become.
8 The Intervenor cites *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697, 169 P.3d 14
9 (2007): "As part of our careful management of shorelines, property owners are also allowed
10 to construct water-dependent facilities such as single-family residences, bulkheads, and
11 docks." Ecology cites *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 51, 202 P.3d
12 334 (2009) (concluding that the legislature did not intend any special preference for private
13 docks).
14

15 *Biggers* was a plurality decision on the question of the City's authority to enact a
16 moratorium on shoreline permit applications. Petitioners and Intervenor in the present case
17 rely on the lead opinion in *Biggers*, written on behalf of four justices. A fifth justice expressly
18 repudiated the reasoning in the lead opinion, concurred with the legal reasoning of the
19 dissenting four, but concurred in the outcome – invalidating the moratorium – on other
20 grounds.¹³⁷ The Board is hesitant to put much weight on the lead opinion in *Biggers*.
21

22 *Samson*, relied on by Ecology and the City, upheld Bainbridge's SMP amendment
23 prohibiting single-use docks in Blakely Harbor. Realtors' assert that *Samson* has limited
24 applicability because it was "decided without regard to the State Guidelines." Realtors'
25 Brief at 14. However *Samson* was decided directly on the basis of the statutory policies set
26 out in the SMA itself, RCW 90.58.020, particularly the language defining priority uses:
27 "Alterations of the natural condition of the shorelines of the state, in those limited instances
28 when authorized, shall be given priority for . . . shoreline recreational uses including but not
29
30

31
32 ¹³⁶ "Piers and docks, including those accessory to single-family residences, shall be designed and constructed to avoid or, if that is not possible, to minimize and mitigate the impacts to ecological functions, critical areas resources such as eelgrass beds and fish habitats and processes such as currents and littoral drift."

¹³⁷ *Biggers*, supra, concurring opinion, T. Chambers, 262 Wn.2d at 702-706.

1 limited to parks, marinas, piers and other improvements facilitating public access to
2 shorelines of the state.” Putting its emphasis on the statutory priority for piers and
3 improvements “facilitating *public* access,” the *Samson* court concluded: “[O]ur legislature
4 did not intend any specific preference for *private* docks.” 149 Wn. App. at 51 (emphasis
5 added).

6
7 Realtors have not pointed to any provision of the new guidelines which would suggest
8 a different outcome. Neither the new guidelines nor the policy of the SMA require the City to
9 allow new single family docks on every shoreline. PRSM has not shown that any of the
10 critical physical limitations identified by the City in SMP 204, § 6.3.2.4 are misapplied.

11 **The Board finds** PRSM and the Realtors have failed to show that the SMP’s
12 provisions related to piers, docks, and floats are inconsistent with the SMA and the
13 guidelines.
14

15 As to the SMP provision concerning mooring buoys, Petitioners repeat their assertion
16 that exemption from SSDP requirements prohibits any City regulation of this use. PRSM
17 Brief at 48. Ecology responds: “Just because a use may be permissible in shoreline
18 jurisdiction, that does not mean it is to be allowed without limit everywhere in the shoreline.”
19 Ecology Brief at 27.

20 The SMP provides: “Mooring buoys are a preferred use over docks, where feasible.”
21 SMP p. 205, §6.3.5.2. The SMP imposes limits on the density and location of buoys to
22 minimize interference with navigation and to protect shellfish beds. SMP, p. 212, §6.3.7.8.1
23 and .2. The PRSM and Realtors briefs generally ignore the importance of navigation in the
24 SMA. The policy of RCW 90.58.020 calls for shoreline plans which, “while allowing for
25 limited reduction of rights of the public in navigable waters, will promote and enhance the
26 public interest.” This policy, according to the statute, “contemplates protecting against
27 adverse effects to the public health, the land and its vegetation and wildlife, and the waters
28 of the state and their aquatic life, while protecting generally public rights of navigation and
29 corollary rights incidental thereto.” Reasonable limits on location and spacing of docks,
30 piers, floats and buoys protect the public interest in navigability. Neither PRSM nor Realtors
31 have shown the City’s regulations to be unreasonable, much less unlawful.
32

1 **The Board finds** Petitioners have failed to demonstrate the SMP provisions for
2 mooring buoys violate the SMA or the guidelines.

3
4 **IV-3. Whether SMP provisions concerning bulkheads fail to comply with RCW**
5 **90.58.030(3)(e)(ii), WAC 173-27-040(2),¹³⁸ WAC 173-26-231(3)(a), and**
6 **WAC173-26-191(2)(a)(iii)(A). PFR 39, 40, 41, 42, 43, 69.**

7 **Applicable Law**

8 **RCW 90.58.030(3)(e)(ii)** exempts from the requirement for an SSDP: "Construction
9 of the normal protective bulkhead common to single family residences."

10 **RCW 90.58.100(6)** provides:

11 6) Each master program shall contain standards governing the protection of
12 single-family residences and appurtenant structures against damage or loss
13 due to shoreline erosion. The standards shall govern the issuance of
14 substantial development permits for shoreline protection, including structural
15 methods such as construction of bulkheads, and nonstructural methods of
16 protection. The standards shall provide for methods which achieve effective
17 and timely protection against loss or damage to single-family residences and
18 appurtenant structures due to shoreline erosion. The standards shall provide
19 a preference for permit issuance for measures to protect single-family
20 residences occupied prior to January 1, 1992, where the proposed measure
21 is designed to minimize harm to the shoreline natural environment

22 The guidelines at **WAC 173-26-191(2)(a)(iii)(A)** provide, in pertinent part:

23 . . . Many activities that may not require a substantial development permit,
24 such as clearing vegetation or construction of a residential bulkhead, can,
25 individually or cumulatively, adversely impact adjacent properties and natural
26 resources, including those held in public trust. Local governments have the
27 authority and responsibility to enforce master program regulations on all uses
28 and development in the shoreline area.

29 The guidelines at **WAC 173-26-231(3)(a)(iii)** contain the following bulkhead provisions:

30 (B) New structural stabilization measures shall not be allowed except
31 when necessity is demonstrated in the following manner:

32 (I) To protect existing primary structures:

 • New or enlarged structural shoreline stabilization measures for an
existing primary structure, including residences, should not be allowed unless

¹³⁸ Compliance with WAC 173-27-040(2) is not within the Board's scope of review.

1 there is conclusive evidence, documented by a geotechnical analysis, that
2 the structure is in danger from shoreline erosion caused by tidal action,
3 currents, or waves. Normal sloughing, erosion of steep bluffs, or shoreline
4 erosion itself, without a scientific or geotechnical analysis, is not
5 demonstration of need. The geotechnical analysis should evaluate on-site
6 drainage issues and address drainage problems away from the shoreline
7 edge before considering structural shoreline stabilization ...

8 (C) An existing shoreline stabilization structure may be replaced with a
9 similar structure if there is a demonstrated need to protect principal uses or
10 structures from erosion caused by currents, tidal action, or waves....

11 (D) Geotechnical reports pursuant to this section that address the need to
12 prevent potential damage to a primary structure shall address the necessity
13 for shoreline stabilization by estimating time frames and rates of erosion and
14 report on the urgency associated with the specific situation. As a general
15 matter, hard armoring solutions should not be authorized except when a
16 report confirms that there is a significant possibility that such a structure will
17 be damaged within three years as a result of shoreline erosion in the
18 absence of such hard armoring measures, or where waiting until the need is
19 that immediate, would foreclose the opportunity to use measures that avoid
20 impacts on ecological functions. Thus, where the geotechnical report
21 confirms a need to prevent potential damage to a primary structure, but the
22 need is not as immediate as the three years, that report may still be used to
23 justify more immediate authorization to protect against erosion using soft
24 measures.

25 Discussion and Analysis

26 The guidelines at WAC 176-26-231 indicate shoreline armoring is associated with the
27 following adverse impacts to shoreline ecological functions:

- 28 • Beach starvation
- 29 • Habitat degradation
- 30 • Sediments impoundment
- 31 • Exacerbation of erosion
- 32 • Groundwater impacts
- Hydraulic impacts
- Loss of shoreline vegetation
- Creation of conditions that weaken the bulkhead over time.

Herrera's *Addendum to the Summary of Science Report* (2001), Ex. 506, pp. 8-14,
lays out the recent scientific assessment of nearshore geomorphic processes and land
forms along Bainbridge Island's shores – rocky coasts, bluffs, barrier beaches, and

1 embayments – and the impacts from shoreline armoring. Approximately 49% of the
2 Bainbridge Island shoreline is armored, and half of this armoring extends into the intertidal
3 zone. Addendum, Ex. 506, pp. 52-53. Bainbridge Island’s Coastal Geomorphic/Feeder Bluff
4 Mapping, Ex.117, p. 26, documents a 60% loss of sediment supply in beaches downdrift
5 from feeder bluffs. “Throughout Bainbridge Island’s shorelines, shoreline stabilization
6 structures appear to have cut off a number of feeder bluffs from performing natural
7 processes of beach formation and nourishment.” Addendum, p. 53. Where the structures
8 extend below the OHWM, beach erosion and impacts to critical habitat are exacerbated. *Id.*

10 The Board notes residents of Central Puget Sound have given up our cherished
11 wood-burning fireplaces, beach bonfires, and autumn leaf-burning as we’ve come to
12 understand the region’s stagnant air patterns and the health risks of small-particulate air
13 pollution. Similarly, greater knowledge of marine shoreline geomorphic processes and the
14 habitat needs of nearshore flora and fauna may require adjustments to our reliance on hard
15 armoring of marine shores.

17 Intervenor claims the SMP “has a distinct bias against bulkheads.” Realtors’ Brief at
18 12. Ecology counters that Intervenor’s brief provides no indication where in the SMP such
19 bias is demonstrated, and makes no argument as to how the SMP’s bulkhead regulations
20 violate any provision of the SMA or guidelines. Ecology Brief, at 34.

22 Petitioners find four flaws in the SMP provisions concerning bulkheads or shoreline
23 stabilization. PRSM Brief at 44-47. First, though the SMA provides an exemption from an
24 SSDP, the City approval process amounts to permitting. PRSM Brief at 44. Second, the
25 SMA prohibits bulkheads in the Natural and Island Conservancy designations. Third, the
26 City requires a geotechnical analysis to support application for a bulkhead replacement
27 while the guidelines only require a professional report for a new stabilization measure.
28 Fourth, repair of a bulkhead is limited to 50% once every 5 years.

30 PRSM argues that though the SMA exempts bulkheads from SSDP requirements, a
31 significant City approval is required, starting with a pre-application meeting. SMP, p. 190, §
32 6.1.5. “A statement of exemption, shoreline conditional use, or shoreline substantial

1 development permit must be obtained from the City before commencing construction.” SMP
2 p. 192, § 6.2.2.

3 RCW 90.58.030(3)(e)(ii) exempts from the SSDP requirement “construction of the
4 normal protective bulkhead¹³⁹ common to single family residences.” However, PRSM
5 ignores RCW 90.58.100(6) which provides:

6 Each master program shall contain standards governing the protection of
7 single-family residences and appurtenant structures against damage or loss
8 due to shoreline erosion. *The standards shall govern the issuance of*
9 *substantial development permits for shoreline protection*, including structural
10 methods such as construction of bulkheads, and nonstructural methods of
11 protection. The standards shall provide for methods which achieve effective
12 and timely protection against loss or damage to single-family residences and
13 appurtenant structures due to shoreline erosion. (emphasis added)

14 The City’s SMP requires a pre-application meeting in connection with a shoreline
15 modification project to determine, in the first instance, whether the proposal is “necessary to
16 support or protect an allowed primary structure or a legally established existing shoreline
17 use that is in danger of loss or substantial damage.” SMP, p.190, § 6.1.5. “Even when
18 exempt from the shoreline substantial development process,” the SMP states, “these
19 structures must comply with all applicable Master Program regulations.” SMP, p.192, §6.2.2.
20 The Board agrees. As discussed above, an exemption from SSDP requirements does not
21 exempt development from compliance with the SMP, the guidelines or other permitting
22 requirements.
23

24 PRSM’s objection to the SMP prohibition of new bulkheads in Natural and Island
25 Conservancy designations is similarly without merit. SMP at 42, Table 4-1. New single-
26 family homes are prohibited in the Natural environment and a conditional use in Island
27 Conservancy. The Natural shoreline designation (approximately 1% of the City’s shores, Ex.
28 E-101 at 6), comprises “areas that perform irreplaceable shoreline ecological functions or
29 ecosystem-wide processes that would be damaged by human activity, including areas with
30
31

32 ¹³⁹ WAC 173-27-040(2)(c): A “normal protective” bulkhead includes those structural and nonstructural
developments installed at or near, and parallel to, the ordinary high water mark for the sole purpose of
protecting an existing single-family residence and appurtenant structures from loss or damage by erosion....”

1 unique natural features, such as wetlands, estuaries, unstable bluffs, coastal dunes, sand
2 spits, and ecologically intact shoreline habitats.” SMP at 29, § 3.2.5.2. It is appropriate that
3 shoreline stabilization is prohibited in such areas. SMP at 192-95, § 6.2.4.4. See WAC
4 173-26-231(3)(a)(iii)(A): “New development should be located and designed to avoid the
5 need for future shoreline stabilization to the extent feasible.”

6
7 In the Island Conservancy environment, the SMP prohibition against bulkheads still
8 provides multiple options for shoreline stabilization: retaining walls, bluff walls, hybrid
9 structures and non-structural or soft-treatment stabilization. SMP at 28, § 3.2.4.2.6; 42-43,
10 Table 4-1. SMP at 191-92, § 6.2.1. The Board fails to see how prohibiting new bulkheads in
11 areas where new waterfront homes are prohibited or restricted violates any provision of the
12 SMA or the guidelines.

13
14 Petitioners next object to the City’s requirement for a professional geotechnical
15 analysis prior to replacement of a bulkhead. PRSM Brief at 45-46. PRSM points out
16 WAC 173-26-231(3)(a)(iii)(B) specifies the use of geotechnical analysis for a *new* shoreline
17 stabilization structure but WAC 173-26-231(3)(a)(iii)(C) does not have the same requirement
18 for a *replacement* structure.

19
20 The Board observes that the guidelines require professional analysis, in the first
21 instance, to determine whether the erosion is being caused by upland conditions, such as
22 loss of vegetation or upland drainage. “Non-structural measures, planting vegetation or
23 installing onsite drainage improvements, [may be] feasible and sufficient.” WAC 173-26-
24 231(3)(a)(iii)(B)(II). The City’s SMP requirement for review of a replacement shoreline
25 stabilization structure by a geotechnical professional is based on the same principle. “When
26 evaluating the need for new, expanded or replacement stabilization measures, the applicant
27 shall provide an analysis from a qualified professional that examines . . . [n]on-structural
28 measures such as vegetation enhancement or addressing upland drainage concerns.” SMP
29 pp. 197-98, §6.2.8(1)(b). If, in fact, the erosion is being caused primarily by remediable
30 upland conditions, expansion or replacement of the bulkhead will be futile. The City is
31 entitled to know that before authorizing the project. Further, the City should know whether
32

1 the structure is likely to be effective. The Addendum notes “the placement of bulkheads is
2 often unnecessary or even counterproductive.” *Id.* at 52.¹⁴⁰

3 Petitioner’s fourth objection is to the SMP limitations on bulkhead repair and
4 replacement. PRSM Brief at 46-47. The City’s SMP limits bulkhead repair to 50% once
5 every five years:

6 Repair of existing structural stabilization shall be allowed as follows:

7 a. Existing shoreline stabilization which no longer adequately serves its
8 intended purpose shall be considered a replacement.

9 b. Damaged structural stabilization may be repaired up to fifty percent (50%) of
10 the linear length within a Five (5) year period. Repair area that exceeds fifty
11 percent (50%) shall be considered a replacement. Stabilization repair
12 applications shall consider cumulative approvals of each successive application
within a five year period.

13 SMP, p. 197, § 6.2.7.2.

14 For PRSM, “the most significant issues are the 50% limitation no matter how it is
15 measured and the 5 year time limit.” They point out the statute mandates “[e]ach master
16 program shall contain standards governing the protection of single-family residences and
17 appurtenant structures against damage or loss due to shoreline erosion. . . . The standards
18 shall provide for methods which achieve *effective and timely protection against loss or*
19 *damage* to single-family residences and appurtenant structures due to shoreline erosion.”
20 RCW 90.58.100(6) (emphasis from PRSM Brief, p. 46). Repairing only half of a bulkhead is
21 not effective, PRSM points out, and damaging storms make occur more than once in five
22 years. PRSM Brief at 47. Neither the SMA nor the Guidelines authorize such limitations on
23 bulkhead repair, in PRSM’s view.

24 Ecology concurs that repairing only half of a bulkhead is not effective. Ecology Brief
25 at 25. At the point where more than 50% of a shoreline stabilization structure is in need of
26 repair, Ecology reasons, a full replacement, rather than a repair will be necessary to protect
27 an existing structure. This is exactly what the SMP provides. Regulations regarding repair
28 apply where less than 50% of the linear length of the bulkhead is damaged. SMP at 197, §
29
30
31
32

¹⁴⁰ Citing Gabriel, A.O. and T.A. Terich, *Cumulative Patterns and Controls of Seawall Construction, Thurston County, Washington*. Journal of Coastal Research 21(3): 430-440, 2005; Finlayson, D. *The Geomorphology of Puget Sound Beaches*. Ph.D. thesis, University of Washington, 2006.

6.2.7.2.b. If more than 50% needs to be repaired, the bulkhead falls under the regulations regarding replacement. SMP at 197-98, § 6.2.8. and 6.2.8.1. In either case replacement of the shoreline structure is permissible. Ecology points out both the guidelines and City code waive the requirements in case of emergency. BIMC 2.16.165.E.2.a (App. A).

Evidently the SMP favors thorough and well-engineered shoreline protection over piecemeal patchwork. While that may prove costly to the homeowner in the short term, Petitioners haven't shown the City's regulations violate the SMA or guidelines requirement for "effective and timely protection against loss or damage to single family residences." RCW 90.58.100(6).

The Board finds Petitioners have failed to meet their burden to demonstrate noncompliance with RCW 90.58.030(3)(e)(ii) and WAC173-26-191(2)(a)(iii)(A).

IV-4. Whether SMP provisions concerning floating homes fail to comply with RCW 90.58.270. PFR 44.

Applicable Law

RCW 90.58.270 was amended in 2011 and 2014 to provide:

(5)(a) A floating home permitted or legally established prior to January 1, 2011, must be classified as a conforming preferred use.

(b) For the purposes of this subsection:

(i) "Conforming preferred use" means that applicable development and shoreline master program regulations may only impose reasonable conditions and mitigation that will not effectively preclude maintenance, repair, replacement, and remodeling of existing floating homes and floating home moorages by rendering these actions impracticable.

(ii) "Floating home" means a single-family dwelling unit constructed on a float, that is moored, anchored, or otherwise secured in waters, and is not a vessel, even though it may be capable of being towed.

(6) (a) A floating on-water residence legally established prior to July 1, 2014, must be considered a conforming use and accommodated through reasonable shoreline master program regulations, permit conditions, or mitigation that will not effectively preclude maintenance, repair, replacement, and remodeling of existing floating on-water residences and their moorages by rendering these actions impracticable.

(b) For the purpose of this subsection, "floating on-water residence" means any floating structure other than a floating home, as defined under

1 subsection (5) of this section, that: (i) Is designed or used primarily as a
2 residence on the water and has detachable utilities; and (ii) whose owner or
3 primary occupant has held an ownership interest in space in a marina, or has
4 held a lease or sublease to use space in a marina, since a date prior to July
5 1, 2014.

6 **WAC 173-26-241(3)(j)** provides:

7 New over-water residences, including floating homes, are not a preferred use
8 and should be prohibited. It is recognized that certain existing communities of
9 floating and/or over-water homes exist and should be reasonably
10 accommodated to allow improvements associated with life safety matters
11 and property rights to be addressed provided that any expansion of existing
12 communities is the minimum necessary to assure consistency with
13 constitutional and other legal limitations that protect private property.

14 **Discussion and Analysis**

15 The SMP policies governing regulation of boating facilities (marinas) state: "Prohibit
16 floating houses." SMP at 159, § 5.3.3.10. The list of prohibited uses which follows includes
17 "Floating homes." SMP § 5.3.4.4.

18 RCW 90.58.270 was amended in 2011 and 2014 to grandfather-in existing "floating
19 homes" and "floating on-water residences" and require their classification as "conforming
20 preferred uses." PRSM argues the provisions of Bainbridge's SMP that prohibit floating
21 homes violate RCW 90.58.270. PRSM Brief at 47.

22 Ecology in response points out SMP § 5.3.4 is the section regulating boating
23 facilities. The SMP prohibits floating homes in boating facilities, but this is a prospective
24 regulation only, not applicable to pre-2011 floating homes or pre-2014 floating on-water
25 residences. Ecology Brief at 25.

26 The Board notes the statutory provisions focus on ensuring that regulations do not
27 make maintenance and repair of existing floating homes and floating home moorages
28 impracticable, but there is no suggestion that new floating homes should be allowed. The
29 City's prohibition of new moorages does not violate RCW 90.58.270.¹⁴¹ Further, it is
30
31
32

¹⁴¹ Since floating homes by definition must be located waterward of the lowest tide, the Board applies the standard of review for shorelines of statewide significance.

1 consistent with the guidelines, which state: "New over-water residences, including floating
2 homes, are not a preferred use and should be prohibited." WAC 176-23-241(3)(j).

3 PRSM also points out an apparent discrepancy in the SMP provisions for overwater
4 residences concerning height increases. PRSM Brief at 47. SMP, p. 183, § 5.9.4.3 prohibits
5 "increase in intensity, including height or bulk, for any existing legally established overwater
6 residence, or for those portions of a residence that are located over the water." However,
7 SMP, p. 187, § 5.9.9.3 provides:

8
9 An existing overwater primary residential use may continue, and the structure
10 may be repaired, maintained, increased in height and remodeled in accordance
11 with Section 4.2.1, Nonconforming Uses, Nonconforming Lots, and Existing
12 Development but the use may not be intensified¹⁴² and the overwater structure
may not be enlarged or expanded over water.

13 However, the Board does not see how this discrepancy rises to the level of clear and
14 convincing evidence of error by Ecology in approving the City's master program.¹⁴³

15
16 **The Board finds** Petitioners have not demonstrated inconsistency with the policy of
17 RCW 90.58.020 or the guidelines.

18 19 **Conclusion for Legal Issue III**

20 The burden of proof required to be met by PRSM is to show (a) by clear and
21 convincing evidence that the provisions as they relate to shorelines of statewide significance
22 are inconsistent with the policy of RCW 90.58.020 and the applicable guidelines; (b) the
23 provisions as they relate to shorelines are clearly erroneous in view of the entire record.

24
25 **The Board finds and concludes** PRSM and Intervenor have failed to meet either
26 burden of proof to establish violations of RCW 90.58.020, 90.58.030(3), 90.58.270, or
27 violations of WAC 173-26-231(3)(a) and (b), and 173-26-201(2)(d)(v) in regards to
28 regulation of shoreline development, the exemption from the shoreline substantial
29 development permit for docks, piers, mooring buoys, and shoreline stabilization, or provision
30 for existing floating homes.

31
32 ¹⁴² At hearing, the City suggested "intensity" might refer to limits on the number of bedrooms in light of the capacity of sanitary systems.

¹⁴³ Clarification by the City in connection with codification or a limited amendment might be useful.

1 **Legal Issue V – Insufficiency in Scope and Detail**

2 **V-1. Whether the City fails to comply with RCW 90.58.100 and WAC 173-26-**
3 **110(3) in adopting a map for designation of shoreline environments that**
4 **is imprecise. PFR 26, PFR 55(b).**

5 **V-2. Whether the City fails to comply with RCW 90.58.080 and WAC 173-**
6 **191(2)(a)(ii)(A) by adopting an SMP that is not sufficient in scope and**
7 **detail to ensure implementation, in that undue discretion is granted to**
8 **the shoreline administrator with respect to compatibility with adjacent**
9 **uses, SMP 3.2.2.6 and 3.2.3.1, suitable location and design of docks and**
10 **piers, SMP 6.3.1.2, approval of activity, SMP 4.1.1.2, SMP at p. 224,**
11 **restriction of re-establishment of non-conforming uses, SMP 4.2.1.5.2,**
12 **and establishment of shoreline buffers, tree retention, and vegetation,**
13 **SMP 4.1.3.6.3, 4.1.3.1.6, 4.1.3.1.5, SMP at p. 286. PFR 55(a)-(k).**

14 **V-3. Whether the SMP is not “sufficient in scope and detail” because of**
15 **internal inconsistencies and inaccurate references to non-existent or**
16 **incorrect provisions. PFR 55(i), 58, 63.**

17 **Applicable Law**

18 RCW 90.58.080 requires that a master program be amended consistent with the
19 Guidelines, and **WAC 173-26-191(2)(a)(ii)(A)** requires:

20 In order to implement the directives of the Shoreline Management Act, master
21 program regulations shall:

22 (A) Be sufficient in scope and detail to ensure the implementation of the
23 Shoreline Management Act, statewide shoreline management policies of
24 this chapter, and local master program policies;

25 **Discussion and Analysis**

26 Petitioners allege the City’s SMP fails to be “sufficient in scope and detail,” stating:
27 “This 400 plus page SMP is complicated, internally contradictory and lacking in essential
28 detail.” PRSM Brief at 53. None of the parties has presented any cases or prior Growth
29 Management Hearings Board decisions explaining what “sufficient in scope and detail”
30 means. Nevertheless, Petitioners assert, “it is clear from the text that the central
31
32

1 requirement is for *detail* sufficient to *ensure implementation* of the SMA and SMP policies.”
2 PRSM Brief at 50-51.¹⁴⁴

3 The Board has often addressed the question whether regulatory detail in
4 GMA enactments is sufficient to ensure implementation of GMA policies. The Board’s
5 reasoning in these cases¹⁴⁵ is instructive on the issue of sufficiency of detail in development
6 regulations to ensure implementation of policies. In *Pilchuck Audubon Society v.*
7 *Snohomish County*, CPSGMHB Case No. 95-3-0047, Final Decision and Order, (December
8 6, 1995) at 36, the Board approved “development regulations that provide administrators
9 with clear and detailed criteria so that in wielding professional judgment, the Director has
10 regulatory ‘sideboards’ and policy direction.” In *Olsen v. City of Kent*, CPSGMHB Case No.
11 03-3-0003, Final Decision and Order, (June 30, 2003) at 7, the Board approved a permit
12 extension ordinance that established four clear criteria to guide the administrator’s flexibility.
13 By contrast, in *Kent C.A.R.E.S. III v. City of Kent*, CPSGMHB Case No. 03-3-0012, Final
14 Decision and Order (December 1, 2003) at 11, the Board found noncompliant a
15 development regulation that authorized the City’s planning manager to make certain
16 determinations limited only by the criterion of “consistency” with “a planned action ordinance
17 or development agreement.” The Board commented: “There is a sharp contrast between
18 vague direction to ‘be consistent’ . . . and clear delineation of the criteria to be used.” *Id.* at
19 12.¹⁴⁶

20 21 22 23 **a. SMP Shoreline Environment Designation Map**

24 First, PRSM contends the SMP designation map (SMP Appendix A at 263) is too
25 imprecise for property owners or members of the public to know which designation each
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27

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¹⁴⁴ The SMP itself is 262 pages long, with an additional 119 pages of appendices. Ironically, while petitioners complain frequently about the document’s length and complexity, they also allege insufficiency in scope and detail.

¹⁴⁵ Some of these cases arise under GMA Goal 7: “Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.”

¹⁴⁶ See also *Aagaard v. City of Bothell*, Final Decision and Order (October 24, 2008), at 15-17, finding ample criteria within the challenged regulation to guide the administrator’s discretion but suggesting, for the purpose of clarity, the city consider assembling the criteria in a Director’s Rule. P.17, n.16.

1 property is within. PRSM Brief at 51. Even when enlarged,¹⁴⁷ the City's map establishing
2 the various designations is not precise enough for citizens to determine which designation
3 their property is in, Petitioners contend, especially for those properties which are near the
4 border between designations.

5 The City acknowledges the designation map which is Appendix A to the SMP does
6 not depict parcel lines. City Brief at 28. The map must be overlaid on a city zoning map to
7 provide that detail.

8
9 The Board notes SMP Section 3.1 provides a clear set of rules that apply to
10 determine designation boundaries when the question cannot be resolved by the map. SMP
11 p. 22.¹⁴⁸ The Board is not persuaded that the map is so generalized as to interfere with the
12 implementation of the SMP, taking into account the applicable methods for resolving
13 uncertainties.

14
15 **The Board finds** Petitioners fail to meet their burden of proof on this issue.

16
17 **b. City Approval for Shoreline Activities**

18 PRSM asserts one of the most egregious problems with the SMP's lack of detail is
19 the SMP's requirement for City approval for any "activity." PRSM Brief at 50. PRSM
20 challenges SMP, p. 67, § 4.1.1.2 (emphasis added):
21
22

23
24 ¹⁴⁷ See HOM Ex. 1, Enlargement of portion of SMP Appendix A.

25 ¹⁴⁸ "Designation Boundaries: Where the shoreline jurisdiction or designation is uncertain, the official shoreline
26 designation map shall be used to determine boundary location. If the conflict cannot be resolved using the
27 shoreline designation map, the following rules shall apply:

- 28 1. Boundaries indicated as approximately following the center lines of streets, highways, alleys or other
29 roadways shall be construed to follow such center lines.
- 30 2. Boundaries indicated as approximately following lot, fractional section, or other subdivision lines shall
31 be construed as following such subdivision lines.
- 32 3. Boundaries indicated as parallel to or extensions of features identified in subsections 1 and 2 above
shall be so construed.
4. When not specifically indicated of the Shoreline Designation Map, distances shall be determined by
the scale of the map.
5. If there is no designation on the map, then the Shoreline Residential Conservancy applies.

Where existing physical or cultural features are at variance with those shown on the shoreline designation Map
and cannot be determined with certainty by applying subsections 1 through 4 above, the Department shall
determine the location or existence of such feature utilizing any appropriate criteria contained in the Master
Program."

1 *Proposed... use, or activities* within shorelines of statewide significance *shall*
2 *be reviewed* in accordance with preferred policies listed in 4.1.1.3. The
3 Administrator may reduce, alter, or deny proposed...use, or *activity* to satisfy
4 the preferred policy.

5 PRSM points out the definition of activity in the SMP definitions section is extremely broad.
6 “Activity: Human activity associated with the use of land or resources.” SMP at 224. As
7 Petitioner reads the provisions, “Essentially, the SMP requires City approval for any human
8 activity associated with the use of land.” PRSM Brief at 50.

9 The City points to the narrower definition of activity within the context of Section 4 of
10 the SMP. City Brief at 25. Section 4.0 of the SMP, General (Island-Wide) Policies and
11 Regulations, provides in an introductory sentence:

12 The following general policies and regulations apply to all designations.
13 These provisions are to be used in conjunction with the more specific
14 shoreline use (referred to as “uses”) and shoreline modification activity
15 (referred to as “activities”) policies and regulations found in Sections 4.0 and
16 5.0 respectively.

17 SMP at 37. Shoreline modification is, in turn, defined as “those actions that modify the
18 physical configuration or qualities of the shoreline area, usually through the construction of a
19 physical element such as a dike, breakwater, pier, weir, dredged basin, fill, bulkhead, or
20 other shoreline structure. They can include other actions, such as clearing, grading, or
21 application of chemicals.” SMP at 255.

22 The Board finds in the guidelines numerous references to regulation of “activities” but
23 no definition of the term. The requirement that policies and regulations apply to all shoreline
24 uses and activities is consistent with SMA policies and Washington caselaw. Specifically,
25 WAC 173-26-186(8), one of the “governing principles of the guidelines,” provides:

26 It is recognized that shoreline ecological functions may be impaired not only
27 by shoreline development subject to the substantial development permit
28 requirement of the act but also by past actions, *unregulated activities*, and
29 development that is exempt from the act's permit requirements. (emphasis
30 added).

31 Similarly, WAC 173-26-191(2)(a)(iii)(A), Master Program Contents, provides:
32

1 The Shoreline Management Act's provisions are intended to provide for the
2 management of all development and uses within its jurisdiction, *whether or*
3 *not a shoreline permit is required. Many activities* that may not require a
4 substantial development permit, such as clearing vegetation or construction
5 of a residential bulkhead, can, individually or cumulatively, adversely impact
6 adjacent properties and natural resources, including those held in public
7 trust. (emphasis added).

8 The Washington Supreme Court has previously held, in *Clam Shacks of America,*
9 *Inc. v. Skagit County*, 109 Wn.2d 91, 743 P.2d 265 (1987), that local governments are
10 authorized to regulate "shoreline activities," which are not "developments" as defined by the
11 SMA. Thus, the SMP's use of the word "activities" is supported by SMA regulations and
12 caselaw that emphasize the policy of regulating activities that take place within the shoreline
13 jurisdiction and may have a cumulative impact on the shoreline.

14 Perhaps the Bainbridge SMP attempted to achieve this by defining "activity" as
15 "human activity *associated with use of the land or resources*," but the definition is open-
16 ended and all-encompassing, in the Board's view. It is not limited to actions that may have
17 an adverse or cumulative impact on shorelines.

18 The Board has previously ruled definitions in a GMA plan or regulation do not in
19 themselves constitute bases for determining compliance. Rather, the Board looks to how
20 the definition is connected to other parts of the enactment and then rules on how those
21 definitions were used in the context of the enactment. In *Friends of the San Juans v. San*
22 *Juan County*, GMHB Case No. 13-2-0012c, Final Decision and Order (September 6, 2013),
23 at 93, the Board responded to an argument that a regulation's definition was vague and
24 susceptible to multiple interpretations resulting in a lack of sufficient guidance to County
25 staff administering the ordinance:
26

27
28 One cannot view the definitions in isolation but must relate them to the
29 regulations themselves. It is not a requirement that a definition include
30 adequate standards for appropriate, consistent administration. The GMA
31 requires those standards to be included somewhere in the regulations.

32 Here PRSM's specific challenge is to SMP, p. 67, §4.1.1.2, concerning applicability of
provisions for shorelines of statewide significance, *i.e.*, waterward from the line of extreme

1 low tide.¹⁴⁹ Beyond § 4.1.1.2, the SMP specifies that for purposes of SMP Sections 4.0 and
2 5.0, “activities” means “shoreline modification activities.” SMP, p. 37, §4.0 Introduction.
3 PRSM has not identified any “activity” regulated elsewhere in the SMP which cannot be
4 appropriately implemented because the definition of “activity” is too broad or vague.¹⁵⁰

5 **The Board finds** Petitioners have failed to meet their burden of proof on this issue.
6

7 **c. Compatibility with Adjacent Uses**

8 PRSM objects to provisions of SMP §§ 3.2.2.6¹⁵¹ and 3.2.3.1 requiring development
9 to be “compatible” with “adjacent uses and activities in upland and aquatic designations,”
10 together with the SMP, p. 224, definition of “adjacent” as being “near or close” rather than
11 being “adjoining.” PRSM Brief at 50. According to PRSM, the definition of adjacent and the
12 imprecision of “compatibility” create a “fundamental ambiguity” so that “[a] citizen cannot
13 read the SMP and know what rules apply.”
14

15 The Petitioners misread the SMP on this point, in the Board’s view. Section 3 of the
16 SMP sets out designation criteria for shoreline environmental designations. Section 3.2.2
17 provides management policies for the Shoreline Residential designation and Section 3.2.3
18 provides management policies for Shoreline Residential Conservancy. As policies, these
19 sections contain general language: “should,” “where feasible,” “encouraged,” “compatible.”
20 As the City points out, the “Management Policies” and “Purpose” sections of these shoreline
21 designations do not constitute specific regulations or approval criteria that might result in *ad*
22 *hoc* application to a person that has sought to comply with the ordinance and/or who is
23 alleged to have failed to comply. SMP at 8, § 1.1 (“The policies are not regulations in
24 themselves, and, therefore, do not impose requirements beyond those set forth in the
25 regulations.”). City Brief at 27. Specific shoreline use and modification regulations for each
26 designation are detailed in Table 4.1 and elsewhere in the SMP. These constitute sufficient
27 criteria for administration of the program.
28
29
30

31 ¹⁴⁹ In shorelines of statewide significance, Petitioners need not worry that lawn croquet might be regulated, but
32 operation of jet skis might be, for example.

¹⁵⁰ While a more precise definition of activity might be desired, the Board does not substitute its preferences for
the choices of the elected officials.

¹⁵¹ PRSM presumably means §3.2.2.3.6.

1 **The Board finds** Petitioners have not met their burden of proof on this issue.

2
3 **d. Suitable Location and Design of Docks and Piers**

4 PRSM argues SMP § 6.3.1.2 gives the Shoreline Administrator unlimited discretion
5 regarding docks and piers by requiring that they be “suitably located and designed.” PRSM
6 Brief at 51.

7 Again, Petitioners appear to have read the general provisions of the “Applicability”
8 subsection for overwater structures, Section 6.3,¹⁵² and failed to read forward to the rest of
9 Section 3 containing detailed regulations outlining where piers and docks of various types
10 can be located and how they should be designed. SMP, pp. 204-211. A single reference in
11 the Applicability section relating to Overwater Structures is not indicative of lack of detail
12 needed for effective implementation.

13
14 **The Board finds** the SMP does not lack detail regarding suitable location and design
15 of docks and piers.

16
17 **e. Site-specific Buffer Delineations**

18 PRSM objects that the shoreline buffers are too site-specific and the criteria too
19 complex to be readily determined by the property owner. PRSM Brief at 52. To ensure
20 implementation of the SMA, PRSM argues, a decision as fundamentally critical to use of
21 property as the location of a buffer should not be left to the whim of the Shoreline
22 Administrator.

23
24 The City explains the depth of the shoreline buffer is determined by the physical and
25 geomorphic characteristics of the property, which match descriptions for either Shoreline
26 Buffer Category A or Category B. SMP at 82, § 4.1.3.6.1. City Brief at 29. The depth of
27 buffer for each of these Categories is established in Table 4-3, SMP at 66, attached to this
28 order as Appendix A. Within the shoreline buffer, there are two zones, the depth of each
29 determined by a site-specific analysis. Zone 1 extends from the OHWM a minimum of 30
30 feet or to the limit of existing native vegetation, whichever is greater. Zone 2 is immediately
31
32

¹⁵² SMP 6.3.1.2 provides that the City will review all proposals for piers and docks to determine whether the proposal is “suitably located and designed.”

1 landward of Zone 1 and extends no further than the depth of the Shoreline Buffer, as
2 established by the Category. SMP at 82, § 4.1.3.6.3. In addition, the City's Critical Areas
3 Ordinance allows the Director to increase buffer widths, up to 50% greater than the
4 applicable buffer to protect known locations of endangered, threatened, or state monitored
5 or priority species for which a habitat management plan indicates a larger buffer is needed.
6 These terms are also defined in the SMP. SMP at 286, Appendix B-8(C)(4)(b).
7

8 The Board sympathizes with Petitioners' objection to the complexity of parcel-by-
9 parcel buffer designation criteria. However, in the Board's experience, buffer regulation
10 requires weighing numerous factors. Property owners often demand site-specific analysis.
11 When Kitsap County updated its critical areas regulations, the Kitsap Association of
12 Property Owners (KAPO), represented by Dr. Don Flora on the County's technical advisory
13 committee, opposed uniform buffer requirements and called for site-specific measures.¹⁵³ In
14 *Hood Canal Environmental Council v. Kitsap County*, CPSGMHB 06-3-0012c, Final
15 Decision and Order (August 28, 2006) at 35, the Board noted:
16

17 KAPO presents science (or a critique of the County's documents) which
18 supports site-specific protections, pointing out that the County's own BAS
19 indicates the superiority of site-specific measures. For KAPO, especially
20 where homes, lawns and gardens, shopping malls and parking lots, docks
21 and shoreline armoring create a variety of impacts on the resource to be
22 protected, "universal buffers" are unsupportable. KAPO argues that BAS
23 requires the County to eliminate uniform buffer requirements in the built
24 environment and find a more fine-tuned and site-specific mechanism for
25 protecting critical areas.

26 In *Hood Canal*, Kitsap County chose a uniform buffer approach, in part because it
27 was administratively feasible. *Id.* at 36. Similarly, in *DOE/CTED v. City of Kent*, CPSGMHB
28 Case No. 05-3-0034, Final Decision and Order (April 19, 2006) at 31, the City of Kent's BAS
29 consultant advised the City that a site-specific evaluation of each wetland/buffer complex
30 would allow the most effective and tailored regulation to protect functions and values, but
31 would be impracticable. The City of Kent opted for a uniform approach.
32

¹⁵³ *Hood Canal v. Kitsap County*, CPSGMHB 06-3-0012c, Final Decision and Order (August 28, 2006) at 31-32.

1 Bainbridge Island's SMP, by contrast, adopts criteria allowing the marine buffers to
2 be tailored to the "physical and geomorphic characteristics of the property," coupled with
3 adjustment for protection of species for which a habitat management plan indicates a larger
4 buffer is needed. In choosing the site-specific approach, the City necessarily created a more
5 detailed system than a blanket buffer size.¹⁵⁴ The criteria appear to the Board to be clearly
6 drawn. While more complex to administer, the buffer system adopted in the SMP is bounded
7 by reasonable and established criteria that citizens and the Shoreline Administrator should
8 be able to apply.
9

10 **The Board finds** Petitioners have not met their burden on this issue.
11

12 **f. Preservation of Significant Trees**

13 PRSM objects that SMP § 4.1.3.5.6 allows the City's Shoreline Administrator to
14 require retention of "significant trees" but without providing any criteria in the SMP to guide
15 the Administrator's determination as to which trees are significant. PRSM Brief at 52.¹⁵⁵ The
16 City at hearing pointed to its tree ordinance, codified in the zoning code, which defines a
17 significant tree.¹⁵⁶
18

19 The Board notes the SMP vegetation management provisions require retention of
20 significant trees in the shoreline jurisdiction, SMP §§ 4.1.3.5.4.a and 4.1.3.5.6, unless
21 removal is specifically allowed under other exceptions of SMP provisions. SMP at 79, 80.
22 There is no undue discretion granted the Administrator with respect to retention of
23 significant trees.
24

25 **The Board finds** no insufficiency of scope or detail in the SMP provisions concerning
26 significant trees.
27

28 ¹⁵⁴ The Board recognizes the GMA requirement for best available science in buffer designation for critical
29 areas is not at issue here.

30 ¹⁵⁵ PRSM refers to SMP § 4.1.3.1.6, but the intention is clearly SMP § 4.1.3.5.6, as the City's Response
31 recognizes. The Board prefers to address the question on the merits rather than dismiss for technical flaws.
32 We trust the parties will grant the Board the same courtesy if they find scriveners' errors in the Board's
decision.

¹⁵⁶ BIMC 18.36.030(223): "Significant tree" means: (a) an evergreen tree 10 inches in diameter or greater,
measured four and one-half feet above existing grade, or (b) a deciduous tree 12 inches in diameter or
greater, measured four and one-half feet above existing grade; or (c) all trees located within a required critical
area buffer as defined in Chapter 16.20 BIMC.

1 **g. Exceptions to Native Vegetation Requirement**

2 Petitioners complain that SMP § 4.1.3.5.5¹⁵⁷ authorizes the Shoreline Administrator
3 to allow exceptions to planting of native vegetation if the Administrator is convinced that it
4 will serve the same ecological function as native plants, without defining what ecological
5 functions native plants are supposed to serve. PRSM Brief at 53. However, the City points
6 out that same SMP section specifically states that other plant species (non-native) may be
7 approved that are “similar to the associated native species in diversity, type, density, wildlife
8 habitat value, water quality characteristics, and slope stabilizing qualities, excluding
9 noxious/invasive species” according to a qualified professional. City Brief at 30. “Ecological
10 functions” are further defined in the SMP to include “habitat diversity and food chain support
11 for fish and wildlife, ground water recharge and discharge, high primary productivity, low
12 flow stream water contribution, sediment stabilization and erosion control, storm and water
13 quality enhancement through biofiltration and retention of sediments, nutrients, and
14 toxicants.” SMP at 235.

15
16
17 There should be no confusion about what the term “ecological functions” entails and
18 the types of characteristics the Administrator will consider with respect to non-native plants.
19 The SMP provisions are consistent with WAC 173-26-221(5), which addresses shoreline
20 vegetation conservation requirements for SMPs. The commonly recognized functions of
21 shoreline vegetation in protecting shoreline ecology are listed in WAC 173-26-221(5)(b).
22 Petitioners have provided no evidence that appropriate plant lists are unavailable¹⁵⁸ or
23 would be arbitrarily administered.
24

25 **The Board finds** petitioners have failed to demonstrate the SMP is insufficient in
26 scope and detail with respect to non-native plants.
27
28
29

30
31 ¹⁵⁷ PRSM refers to SMP § 4.1.3.1.5, but the intention is clearly SMP § 4.1.3.5.5.

32 ¹⁵⁸ Knowledgeable home gardeners are familiar with plant lists from local nurseries or regional university
horticultural programs identifying native plants and non-natives that serve particular functions, such as
absorbing stormwater in swales or raingardens, stabilizing bluffs and hillsides, or supporting birds, butterflies,
frogs, and other wildlife. The qualified professionals who will advise the Administrator concerning the functional
equivalency of ornamental plants for specific purposes will surely have access to or develop such lists.

1 **h. Discontinued Nonconforming Use**

2 PRSM asserts the SMP definition of nonconforming development at SMP page 248 is
3 confusing. PRSM Brief at 53. The SMP defines the term “nonconforming development” in
4 accordance with WAC 173-27-080(1) as a “shoreline use or structure” lawfully constructed
5 or established prior to the effective date of the applicable SMP provision and which no
6 longer conforms. PRSM contends this makes unclear whether discontinuing *use* of a
7 nonconforming *structure*, like a single family residence in case of damage or non-use (SMP
8 § 4.2.1), would result in loss of the ability to resume residential use in a nonconforming
9 home.
10

11 The SMP provisions distinguish between nonconforming *uses*, which may be
12 discontinued and cannot be re-established following a twelve month period, and
13 nonconforming residential *structures* which can be reconstructed if damaged or destroyed.
14 SMP §§ 4.2.1.3.3, 4.2.1.3.5, 4.2.1.3.7, 4.2.1.5.2. Under the Bainbridge SMP, single family
15 residential use is a conforming use in every upland designation except Natural. See Table
16 4-1, SMP p. 41. In addition, the SMP allows non-conforming uses, which would include
17 multi-family and accessory dwelling units in some designations and single family homes in
18 Natural designations, to be re-established if operated within a nonconforming structure that
19 is damaged or destroyed and the reconstruction takes place within the required time period.
20 SMP § 4.2.1.5.2. Thus, the ability to resume residential uses in a nonconforming home/
21 structure is not jeopardized.
22
23

24 PRSM raises the same concern in complaining that SMP § 4.2.1.5.2: “Once
25 discontinued, re-establishment of nonconforming uses located in the shoreline jurisdiction
26 *shall be restricted*,” creates an “undefined limitation.” PRSM Brief at 52.

27 SMP, p. 122, § 4.2.1.3.5 is the section on Policies (Relating to Nonconforming Uses,
28 Nonconforming Lots, and Existing Development). The next page, SMP, p. 123, § 4.2.1.5.2,
29 Regulations - Nonconforming Uses, explains what is meant by the term “restricted.”
30

31 If a nonconforming use is discontinued for twelve (12) consecutive months,
32 any subsequent use shall be conforming; except that if a nonconforming use
is operated within a nonconforming structure that is accidentally damaged or
destroyed and reconstruction is proposed under Section 4.2.1.6.1(3), then

1 the use may be reestablished within the same time period as the
2 reconstruction for the nonconforming structure pursuant to Section 4.2.1.4(2).

3 The SMP is clear: if the *use* is non-conforming,¹⁵⁹ re-establishment of a discontinued use is
4 prohibited after a twelve-month period except under the circumstances of accidental
5 damage and reconstruction of a nonconforming *structure*.
6

7 **The Board finds** Petitioners have not met their burden on this issue.
8

9 **i. Inaccurate Internal References**

10 Finally, PRSM contends the SMP is insufficient in scope and detail by inaccurately
11 cross-referencing SMP or other city code provisions. PRSM Brief at 53. For instance, SMP §
12 4.1.2.4.3 refers to the site-specific analysis required in accordance with section § 4.1.2.9,
13 but section § 4.1.2.9 does not exist.

14 The City argues these are not errors requiring remand. City Brief at 30. The City
15 attorney at hearing stated the codification process allows for correction of scriveners' errors.
16 The omission of submittal requirements for the site specific analyses required to ensure no
17 net loss of shoreline functions can be remedied by issuance of an informal or promulgated
18 administrative policy containing applicable submittal requirements (citing RCW 36.70B.070
19 (2)).¹⁶⁰
20

21 The Board reads SMP § 4.1.2.4 as providing the parameters for implementation of
22 the no net loss standard. All shoreline development, uses, and activities must utilize a
23 required mitigation sequence, utilize effective erosion control methods, minimize adverse
24 impacts to sensitive environmental areas and functions, and minimize the need for shore
25 stabilization in the future in order to achieve no net loss. The lack of submittal requirements
26 in the SMP does not diminish the sufficiency of detail or delegate undue discretion to the
27 Administrator.
28

29
30 ¹⁵⁹ As set forth above, residential use is a conforming use in most of Bainbridge Island's shoreline
designations.

31 ¹⁶⁰ The Board notes Ecology recommended that the City move all of its submittal requirements into its
32 administrative manual where its submittal requirements for all other permits are kept. Ex. 2092, Bainbridge
Island City Council Meeting, Nov. 20, 2013, Ryan Ericson, p. 23, line 11. See also, SMP 4.0.1(10): "Submittal
requirements for all shoreline development permits or shoreline exemptions are in BMIC Title 2 and the
Administrative Manual."

1 **The Board finds** the SMP inaccuracies identified by Petitioners do not constitute a
2 violation of WAC 173-26-191(2)(a)(ii)(A) or provide grounds for a remand.

3
4 **Conclusions for Legal Issue V**

5 Mere allegations that the SMP will be administered arbitrarily or capriciously are
6 insufficient to meet a petitioner's burden of proof. Mere allegations of vagueness or lack of
7 clarity similarly fail to meet a petitioner's burden of proof. The burden of proof required to be
8 met by PRSM is to show (a) by clear and convincing evidence that the provisions as they
9 relate to shorelines of statewide significance are inconsistent with the policy of RCW
10 90.58.020 and the applicable guidelines; or (b) the provisions as they relate to shorelines
11 are clearly erroneous in view of the entire record.
12

13 **The Board finds and concludes** PRSM has failed to meet either burden of proof to
14 establish the SMP fails to attain the level of clarity required or results in an excessive
15 delegation of discretion to regulators, in violation of RCW 90.58.900 or WAC 173-26-
16 191(2)(a)(ii).
17

18 **Legal Issue VI – Consistency with Comprehensive Plan and Development Regulations**
19

20 **VI-1. Whether the SMP was adopted without considering costs and benefits to**
21 **property owners as required by the Economic Element of the**
22 **comprehensive plan or the overriding principle of preserving marine**
23 **views. PFR 61(a).**

24 This issue has apparently been abandoned by PRSM and the Realtors. Neither of
25 the opening briefs addresses the comprehensive plan provisions referenced in the issue
26 statement. Legal Issue VI-1 is **abandoned** and is **dismissed**.
27

28 **VI-2. Whether the City is not in compliance with RCW 90.58.080(4)(a)¹⁶¹ and RCW**
29 **36.70A.480 because the updated SMP is inconsistent with comprehensive**
30 **plan and development regulations adopted under RCW 36.70A in that uses**

31 ¹⁶¹ RCW 90.58.080(4)(a) addresses the seven-year review of master programs which is required *after* the
32 scheduled update which is the subject of the present appeal. The purpose of that review is "to assure that the
master program complies with the applicable law and guidelines in effect at the time of the review." The
Petitioners' brief does not discuss this statute, which in any event is inapplicable, and any challenge on this
basis is deemed abandoned.

1 allowed in the City's zoning regulations are prohibited in the SMP
2 designations and uses prohibited in the zoning code are allowed in the SMP
3 designations. PFR 61 (b) – (m). Together with VI-4. Whether the hazard trees
4 provisions of the SMP conflict with Comprehensive Plan and development
5 regulations regarding nuisances and incompatible use of land. PFR 61(o).

6 Applicable Law

7 RCW 36.70A.480(3)(a) provides:

8 The policies, goals and provisions of chapter 90.58 RCW and applicable
9 guidelines shall be the sole basis for determining compliance of a shoreline
10 master program with this chapter [GMA] except as the shoreline master
11 program is required to comply with the *internal consistency provisions of*
12 *RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105.* (emphasis
13 added)

14 Discussion and Analysis

15 The scope of the Board's review of an adopted and approved SMP is limited. RCW
16 90.58.190(2)(b) provides, for shorelines:

17 If the appeal to the growth management hearings board concerns *shorelines*,
18 the growth management hearings board shall review the proposed master
19 program or amendment **solely** for compliance with the requirements of this
20 chapter, the policy of RCW 90.58.020 and the applicable guidelines, the
21 *internal consistency provisions of RCW 36.70A.070, 36.70A.040(4),*
22 *35.63.125, and 35A.63.105,* and chapter 43.21C RCW as it relates to the
23 adoption of master programs and amendments under chapter 90.58 RCW.
(Emphasis added)

24 RCW 90.58.190(2)(c) provides:

25 If the appeal to the growth management hearings board concerns a *shoreline*
26 *of statewide significance*, the board shall uphold the decision by the
27 department unless the board, by clear and convincing evidence, determines
28 that the decision of the department is *inconsistent with the policy of RCW*
29 *90.58.020 and the applicable guidelines.* (Emphasis added)

30 The City asserts the Board lacks jurisdiction under RCW 90.58.190(2)(c) to review
31 any of the SSWS provisions of the SMP for comprehensive plan or GMA development
32 regulation consistency. City Brief at 32. Of the various inconsistencies listed by PRSM, only
the rebuilding of the Lynwood Center pier appears to the Board to possibly involve a

1 shoreline of statewide significance. However, as the City points out, the pier is within the
2 Urban designation where such a use is permitted.¹⁶² Thus, if there were a basis for the
3 Board's review, there is no inconsistency with the Comprehensive Plan's allowance of that
4 project.

5 For the rest of PRSM's concerns, the Board looks to the scope of review for
6 provisions concerning shorelines. Here the statute allows the Board to apply "the internal
7 consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105."
8 RCW 36.70A.070 requires that all elements of a comprehensive plan be internally
9 consistent but says nothing about development regulations. The other cited statutes – RCW
10 36.70A.040(4), 35.63.125, and 35A.63.105 – do not apply to cities and counties originally
11 required to plan under the GMA. In *Snohomish County Farm Bureau v. Snohomish County*
12 (*SCFB I*), GMHB Case No. 12-3-0008, Final Decision and Order (March 14, 2013) at 23, the
13 Board concluded that the scope of review set forth in RCW 90.58.190(2)(b) does not
14 provide for Board review of consistency between SMP plan or regulatory provisions and
15 GMA development regulations for GMA initially-planning cities.

16 PRSM's reply brief notes the Board's comment in the *SCFB I* case: "it is unlikely the
17 Legislature intended to exempt GMA's initially-planning counties and cities" from the
18 requirement for regulatory consistency. PRSM Reply at 18. However, since the Board's
19 *SCFB I* decision the Court of Appeals has ruled the Board is not at liberty to construe the
20 statute according to an assumed legislative intent. The court explains:¹⁶³

21 If the plain meaning of a statute is unambiguous, we must apply that plain
22 meaning as an expression of legislative intent without considering extrinsic
23 sources. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). We
24 do not rewrite unambiguous statutory language under the guise of
25 interpretation. *Cerrilo v. Esparza*, 158 Wn. 2d 194, 201, 142 P.3d, 155
26 (2006). And we do not add language to an unambiguous statute even if we
27 believe the legislature 'intended something else but did not adequately
28 express it.' *Kilian v. Atkinson*, 147 Wn. 2d, 16, 20, 50 P. 3d 638 (2002).

29
30
31
32 ¹⁶² SMP Table 4-1 at 39 and 41.

¹⁶³ *Protect the Peninsula's Future v. Growth Management Hearings Board*, Case No. 45459-9-II, 2015 Wn.
App. LEXIS 332, February 18, 2015, p. 10-11.

1 In the present case, all of PRSM's inconsistency allegations except (i) trails and (m)
2 Lynnwood Center pier are based on City development regulations, not comprehensive plan
3 provisions. PRSM Brief at 54-57.¹⁶⁴ PRSM has simply not alleged a statute within the
4 Board's jurisdiction which would encompass violations resulting from inconsistencies
5 between SMP policies or regulations and GMA development regulations.

6 In any event, PRSM has not met its burden to demonstrate regulatory inconsistency.
7 The SMP states: "These designations form an overlay for addressing shoreline
8 considerations to the City's land use regulations." SMP, p. 22, §3.1.¹⁶⁵ Thus, allowing a use
9 or conditional use in the zoning code and prohibiting it in some shoreline designations is not
10 an inconsistency but is precisely the kind of additional protection of fragile shoreline
11 resources that an overlay to upland zoning requires.¹⁶⁶ Conversely, allowing water-oriented
12 uses in the shoreline may be appropriate even where a comparable non-water-oriented use
13 is prohibited in the zoning code. For example, trails are identified in SMP §§ 5.8.5.1.b and
14 5.8.5.3 as examples of water-related recreational facilities and may be allowed in the
15 shoreline jurisdiction although prohibited in the zoning. SMP at 177-78. Merely reciting
16 differences between the master program and the zoning code does not demonstrate internal
17 inconsistency.

18 **The Board finds** Petitioners allegations concerning regulatory inconsistency do not
19 fall within the scope of the Board's review under the statutes relied on in the legal issues.

20
21
22
23 **VI-3. Whether the SMP provisions conflict with the Park District's**
24 **comprehensive plan which is incorporated in the City's Comprehensive**
25 **Plan. PFR 61 (n) (i) – (v).**

26
27 ¹⁶⁴ The same is true of PRSM's concern about hazard trees, Legal Issue VI-4. PRSM states SMP § 4.1.3.4.3
28 (c) requires them to be retained on site for wildlife habitat, which conflicts with development regulations
29 regarding nuisances and incompatible use of land. PRSM Brief at 57. PRSM fails to cite the conflicting
30 regulations, and the Board will not address the matter.

31 ¹⁶⁵ In *Samson v. City of Bainbridge Island*, CPSGMHB Case No. 04-3-0013, Final Decision and Order
32 (January 19, 2005) at 22, the Board concluded that the City was not prohibited from adopting particularized
regulations for certain shoreline areas and compared these shoreline regulations to "overlay zones, subarea
plans, and similar mechanisms to tailor regulations to particular situations, *even where the underlying zoning
or classification may remain the same.*" (emphasis added)

¹⁶⁶ These include PRSM's regulatory inconsistency allegations concerning (a) agriculture, (c) government
facilities, (e) mining and quarrying, (f) solid waste disposal, (g) golf courses, (h) nonwater-oriented recreational
development, (j) multifamily units, (k) single family homes in Island Conservancy, and (l) parking (primary).

Discussion and Analysis

PRSM contends SMP provisions prohibiting various shoreline structures conflict with the Park District's comprehensive plan for proposed improvements. PRSM Brief at 57. The City responds that some of the specific improvements called out by PRSM are permitted or conditional uses in the SMP and others may be located upland of the shoreline jurisdiction. City Brief, at 35-36. There is thus no inconsistency, the City asserts.¹⁶⁷ PRSM states the Park District plan is incorporated in the City's comprehensive plan, and the City has not challenged the assertion. The SMP provisions referenced by PRSM are development regulations from the Shoreline Use Tables, SMP Table 4-1.

Assuming, *arguendo*, that the Parks plan is a comprehensive plan component within the scope of the Board's SMP review for consistency, the Board finds that all the Park District properties at issue are in the Island Conservancy designation, except Blakely Harbor Park which is located in part in the Natural designation. The listed parks provide water-oriented active or passive recreational use. Use of the term "water-oriented" refers to any combination of water-dependent, water-related and/or water-enjoyment uses and serves as an all-encompassing definition for priority uses under the SMA. SMP at 261. Water-enjoyment uses, in turn, include recreational uses, or other uses facilitating public access to the shoreline as a primary characteristic of the use. Primary water-enjoyment uses "may include, but are not limited to, *parks*, piers, and other improvements facilitating public access to shorelines of the state." SMP at 261.

- Site bridging – proposed for Blakely Harbor Park. Park Comp Plan App. at 8.

Although SMP § 6.3.4 prohibits overwater structures in Priority Aquatic

¹⁶⁷ WAC 173-26-211(3) provides guidance for ensuring consistency between shoreline environmental designations and the local comprehensive plan:

In order for shoreline designation provisions, local comprehensive plan land use designations and development regulations to be internally consistent, all three of the conditions below should be met:

- (a) Provisions not precluding one another. ... To meet this criteria, the provisions of both the comprehensive plan and the master program must be able to be met....
- (b) Use compatibility. Land use policies and regulations should protect preferred shoreline uses from being impacted by incompatible uses. The intent is to prevent water-oriented uses, especially water-dependent uses, from being restricted on shoreline areas because of impacts to nearby non-water-oriented uses....
- (c) Sufficient infrastructure. Infrastructure and services provided in the comprehensive plan should be sufficient to support allowed shoreline uses.

1 designations and adjacent to the Natural designation, trails are permitted. SMP at
2 44, Table 4-1. Because passive recreational development and structures
3 accessory to passive use are allowed in the Priority Aquatic designation and
4 public trails are permitted, site bridging at jetties would be allowed. SMP at 177-
5 78, §5.8.5.

- 6 • Boardwalks and viewpoints – proposed for Blakely Harbor Park and Hawley Cove
7 Park. Park Comp Plan App. at 8, 11. For the Island Conservancy designation,
8 boardwalks and viewpoints would be considered either “Active Recreational
9 Development,” which is a conditional use, or “Passive Recreational
10 Development,” which is permitted. SMP at 41; § SMP 5.8.5. Boardwalks and
11 viewpoints would be considered water-enjoyment uses because they provide for
12 recreational and aesthetic enjoyment of the shoreline, which is a priority use of
13 the shoreline. SMP at 177-78, § 5.8.5; SMP at 261.
- 14 • Restroom remodels at Fay Bainbridge Park, permanent restrooms for Blakely
15 Harbor Park, compost toilet for Hidden Cove Park. For Island Conservancy,
16 upland appurtenant structures that support water-oriented active or passive
17 recreational uses are considered accessory uses, which are permitted along with
18 a primary recreational use. SMP at 38, 46, Table 4-1. The record does not reflect
19 whether the restrooms at these parks are located within the shoreline jurisdiction.
- 20 • Barracks improvements at Fort Ward Park and re-adaptation of generator building
21 at Blakely Harbor Park. Unspecified improvements to the barracks and generator
22 building would be evaluated according to the criteria for existing development in
23 SMP § 4.2.1.6. Namely, to the extent that the structures are existing development
24 (nonconforming due to location within shoreline buffers), they may be maintained,
25 repaired, renovated, or remodeled provided that the changes would not alter or
26 increase the nonconformity.¹⁶⁸

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¹⁶⁸ The Park District comprehensive plan expressly acknowledges that its improvement proposals will be
subject to approval by permitting agencies. Park District Comprehensive Plan App. at 008, 011.

- Storage Shed – Fay Bainbridge Park. Because there is no information about where a storage shed will be located, it is impossible to discern whether the shoreline jurisdiction is even applicable. However, it may qualify as an upland appurtenant structure to support a water-oriented active or passive recreational use, both of which are permitted accessory uses in the Island Conservancy designation. SMP at 46, Table 4-1.
- Yurts – Fay Bainbridge Park and Fort Ward Park. Active recreational development is a conditional use in the Island Conservancy designation. SMP at 41, Table 1. “Active Recreational Development” is a defined term that includes “activities that generally require the use of constructed facilities such as playgrounds, athletic fields, boat ramps, and marinas, and/or the use of specialized equipment.” SMP at 252.
- Picnic Shelters – at Fort Ward Park and Hidden Cove Park. Picnic shelters would be considered either “Active Recreational Development,” which is a conditional use in the Island Conservancy designation, or a “Passive Recreational Development,” which is permitted. SMP at 41, Table 4-1. SMP § 5.8.5.3 specifically states that facilities for water-related recreation, such as picnicking, should be located near the shoreline. SMP at 178.
- Tent camping improvements – at Fort Ward Park. Passive Recreational Development is a permitted use in the Island Conservancy designation. SMP at 41, Table 4-1. In addition, “Kayak/Hiking and Related Camp Site” is listed in Table 4-2, Dimensional Standards, as permitted 50 feet from the OHWM. SMP at 60.

In sum, the improvements to shoreline parks proposed in the Park District comprehensive plan are not prohibited by the SMP. **The Board finds** PRSM has failed to demonstrate an inconsistency between the SMP and the Park District comprehensive plan.

1 **Conclusions for Legal Issue VI**

2 Petitioners' allegations of inconsistency between the SMP and the City's
3 comprehensive plans and development regulations are unpersuasive. The burden of proof
4 required to be met by PRSM is to show: (a) by clear and convincing evidence that the
5 provisions as they relate to shorelines of statewide significance are inconsistent with the
6 policy of RCW 90.58.020 and the applicable guidelines; (b) the provisions as they relate to
7 shorelines are clearly erroneous in view of the entire record.
8

9 **The Board finds and concludes** PRSM has failed to meet either burden of proof to
10 establish the consistency challenges are within the Board's scope of review under RCW
11 90.58.190(2)(b) or that the challenged provisions violate RCW 36.70A.480.
12

13 **Legal Issue VII – Enforcement and Penalties**

14 **VII-1. Whether SMP 7.2 conflicts with RCW 90.58.210¹⁶⁹ and RCW 90.58.220 in**
15 **providing for a criminal penalty in circumstances not authorized by the**
16 **SMA. PFR 56, 62.**

17 **Applicable Law**

18 **RCW 90.58.220** provides (in pertinent part):
19

20 In addition to incurring civil liability under RCW 90.58.210, any person found
21 to have willfully engaged in activities on the shorelines of the state in violation
22 of the provisions of this chapter or any of the master programs, rules, or
23 regulations adopted pursuant thereto shall be guilty of a gross misdemeanor,
24 and shall be punished by a fine of not less than twenty-five nor more than
25 one thousand dollars or by imprisonment in the county jail for not more than
26 ninety days, or by both such fine and imprisonment: PROVIDED, That the
27 fine for the third and all subsequent violations in any five-year period shall be
28 not less than five hundred nor more than ten thousand dollars . . .
29

30 **Discussion and Analysis**

31 SMP §7.2.6 makes it a misdemeanor for a person to fail to complete a required
32 restoration plan while §7.2.8 states it is a misdemeanor for a person to receive a second
SMP violation conviction within a 12-month period. PRSM argues the SMA creates only one

¹⁶⁹ PRSM made no arguments regarding RCW 90.58.210 related to Issue VII-1. The allegation of a violation of that statute is deemed abandoned.

1 shoreline related crime, that being a gross misdemeanor, citing RCW 90.58.220. It states
2 the City has no authorization to create new shoreline crimes, either statutorily or by
3 implication. PRSM Brief, at 58.

4 The City argues that nothing in state law precludes it from exercising its police
5 powers to establish criminal penalties for violations of city ordinances. City Brief, at 39.

6 The Board finds no language within RCW 90.58.220 which could be interpreted to
7 preclude the City from imposing additional penalties for SMP violations. Having said that,
8 any further analysis would appear to be controlled by the Supreme Court's decision in *State*
9 *v. Kirwin*, where the court stated: "We presume an ordinance is valid unless the challenger
10 can prove the ordinance is unconstitutional."¹⁷⁰ That presumption is controlling in this
11 situation. The Board has acknowledged on numerous occasions that it has no jurisdiction to
12 consider constitutional challenges.
13

14 **The Board finds** Petitioner is unable to meet its burden of proof regarding an SMP
15 violation of RCW 90.58.220; further, constitutional claims in regards to that issue are beyond
16 the Board's jurisdiction.
17

18
19 **VII-2. Whether the City is not in compliance with RCW 90.58.140 in requiring an**
20 **unlimited surety or bond for mitigation when the Legislature specifically**
21 **amended the statute to remove that option. SMP 4.1.2.7. PFR 57.**

22 **Discussion and Analysis**

23 PRSM contends SMP § 4.1.2.7 violates RCW 90.58.140 by requiring a bond for
24 mitigation. PRSM Brief at 58-59. It states that statute was amended to delete the bond
25 requirement and, consequently, PRSM suggests the City has no authority to impose such a
26 bond. It also contends that WAC 173-26-186(8)(c) provides that restoration may only be
27 required through voluntary, "nonregulatory policies and programs."
28

29 PRSM's arguments are not well taken. As Ecology observes, Ecology Brief at 28-29,
30 the deleted RCW 90.58.140 language authorized a superior court to allow a permittee who
31

32 ¹⁷⁰ *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009), citing *City of Pasco v. Shaw*, 161 Wn.2d 450,
462, 166 P.3d 1157 (2007); *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003);
Heinsma v. City of Vancouver, 144 Wn.2d 556, 561, 29 P.3d 709 (2001).

1 had been successful in defending a permit before the Shoreline Hearings Board to post a
2 bond when the SHB decision was appealed to superior court. Specifically, the amendment
3 deleted the following language from RCW 90.58.140(5)(b): “as the court deems appropriate.
4 The court may require the permittee to post bonds, in the name of the local government that
5 issued the permit, sufficient to remove the substantial development work to restore the
6 environment if the permit is ultimately disapproved by the courts, or to alter the substantial
7 development if the alteration is ultimately ordered by the courts.”¹⁷¹

9 PRSM’s “restoration” bond allegation is similarly inapt. PRSM conflates mitigation
10 with restoration. The SMP’s bond requirement included in § 4.1.2.7 is a “mitigation” bond,
11 not one for “restoration.” An SMP must ensure there is no net loss of ecological function
12 resulting from shoreline development. When development is allowed which would result in
13 negative impacts on ecological function, mitigation is required. The bond is imposed so that
14 the mitigation project actually results in no net loss and, on successful completion, it is
15 refunded. SMP, p. 74, § 4.1.2.7.2. Restoration, as opposed to mitigation, under the City’s
16 SMP remains a voluntary program. See SMP, p. 20, § 1.4.

18 **The Board finds** PRSM has failed to meet its burden of proof regarding a violation of
19 RCW 90.58.140.

21 **Conclusions for Legal Issue VII**

22 Petitioners’ allegations of violations of RCW 90.58.220 and RCW 90.58.140 are
23 unpersuasive. The burden of proof required to be met by PRSM is to show (a) by clear and
24 convincing evidence that the provisions as they relate to shorelines of statewide significance
25 are inconsistent with the policy of RCW 90.58.020 and the applicable guidelines; or (b) the
26 provisions as they relate to shorelines are clearly erroneous in view of the entire record.

28 **The Board finds and concludes** PRSM has failed to meet either burden of proof to
29 establish that the challenged provisions of the SMP violate RCW 90.58.220 or RCW
30 90.58.140.

32

¹⁷¹ Engrossed Substitute House Bill 1724, Chapter 347, Laws of 1995, Sec. 309(5)(b).

CONCLUSION

In Legal Issue I, PRSM asserts the City's procedures in adopting its SMP violated the SMA, the guidelines, and its own public participation plan in numerous respects, including improper notice, inadequate opportunity for and response to citizen comments, and failure to assemble and utilize appropriate information. **The Board finds and concludes** PRSM has failed to meet its burden of proof to establish violations of RCW 90.58.130, RCW 90.58.100(1), or violations of WAC 173-26-090, 173-26-100, 173-26-201(2)(a) and (3)(b)(i) in regards to the City's process of developing and adopting the SMP.

In Legal Issue II, PRSM finds fault with the City's application of general provisions of the SMA and guidelines. **The Board finds and concludes** PRSM failed to demonstrate violations of RCW 90.58.020, 90.58.080, 90.58.090(4), 90.58.100(2), RCW 36.70A.170 and .050, or violations of WAC 173-26-110, 173-26-191, or 173-26-221(2) in regards to inclusion of required elements, treatment of shorelines of statewide significance, restrictions of development in critical areas, or in application of its shoreline designation process.

In Legal Issue III, PRSM and Intervenor argue that numerous SMP provisions negate the priority for single family residences and appurtenances granted in RCW 90.58.020 and the SSDP exemption in RCW 90.58.030(3)(e). **The Board finds and concludes** PRSM and Intervenor failed to establish violations of RCW 90.58.020, 90.58.030(3)(e), 90.58.140, or violations of WAC 173-26-110, 173-26-191, or 173-26-221(5) in regards to the preferred status of single-family residential uses, the non-retroactivity of SMP provisions, the exemption from the shoreline substantial development permit for shoreline homes and appurtenances, and the vegetation management standards applicable to existing homes.

In Legal Issue IV, PRSM and Intervenor object to SMP regulatory requirements for shoreline developments and modifications that are exempt from the requirement for a shoreline substantial development permit under RCW 90.56.030(3). **The Board finds and concludes** PRSM and Intervenor failed to demonstrate violations of RCW 90.58.020, 90.58.030(3), 90.58.270, or violations of WAC 173-26-231(3)(a) and (b), 173-26-201(2)(d)(v) regarding regulation of shoreline development, the SSDP exemptions for

docks, piers, mooring buoys, and shoreline stabilization, or provision for existing floating homes.

Under Legal Issue V, PRSM contends the SMP is too complicated, internally contradictory and lacking in essential detail to ensure implementation of the SMA policies and the guidelines. The Board concurs with PRSM that several SMP provisions are poorly written. However, **the Board finds and concludes** PRSM has not met its burden to establish the SMP fails to attain the level of clarity required or results in an excessive delegation of discretion to regulators, in violation of RCW 90.58.900 or WAC 173-26-191(2)(a)(ii).

Under Legal Issue VI, PRSM asserts provisions of the SMP are inconsistent with the City's comprehensive plan and development regulations. **The Board finds and concludes** PRSM failed to establish the consistency challenges are within the Board's scope of review under RCW 90.58.190(2)(b) or that the challenged provisions violate RCW 36.70A.480.

Under Legal Issue VII, PRSM challenges the SMP provisions for enforcement and penalties. **The Board finds and concludes** PRSM has not carried its burden to establish that the challenged provisions violate RCW 90.58.220 or RCW 90.58.140.

The legal issues raised by Petitioners are **dismissed**.

ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the Shoreline Management Act and applicable guidelines, the Growth Management Act, prior Board orders and case law, having considered the arguments of the parties, and having deliberated on the matter:

- **The Board concludes** Petitioners and Intervenor failed to provide clear and convincing evidence demonstrating the challenged action, as it pertains to Shorelines of Statewide Significance, was inconsistent with the policy of RCW 90.58.020 and the applicable guidelines in WAC 173-26.
- **The Board also concludes** Petitioners and Intervenor were unable to demonstrate the challenged action, as it pertains to shorelines, failed to comply

1 with the policy of RCW 90.58.020 and the applicable guidelines, or the internal
2 consistency provisions of RCW 36.70A.070.

- 3 • The appeal is **denied** and Case No. 14-3-0012 is **dismissed**.
4

5 Entered this 6th day of April, 2015.
6
7

8 _____
Margaret A. Pageler, Board Member
9

10 _____
Cheryl Pflug, Board Member
11
12

13 _____
William Roehl, Board Member
14
15

16 **Note: This is a final decision and order of the Growth Management Hearings Board**
17 **issued pursuant to RCW 36.70A.300.¹⁷²**
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32 ¹⁷² A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.